CORRECTED COPY

(3)

90-696

No. _____

In The

Supreme Court of the United States

October Term, 1990

LEO HEIDEMAN and SHIRLEY HEIDEMAN,

Petitioners,

vs.

PFL, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DENNIS E. EGAN
Counsel of Record
Missouri I.D. No. 27449
POPHAM, CONWAY, SWEENY,
FREMONT & BUNDSCHU, P.C.
1300 Commerce Trust
Building
922 Walnut Street
Kansas City, MO 64106
(816) 221-2288

Attorneys for Petitioners

QUESTIONS PRESENTED

1. Does the Eighth Circuit's decision conflict with decisions by other Courts of Appeals which have held that whether the ADEA statute of limitations is tolled because of affirmative misconduct of the employer ordinarily is a question of fact which precludes summary judgment?

2. Did the Court of Appeals, in affirming summary judgment against a victim of a blatant, yet concealed scheme of willful age discrimination, sanction the district court's improper application of Rule 56 of the Federal Rules of Civil Procedure, ignore the humanitarian purposes underlying the ADEA and its doctrines for "tolling" statutes of limitations, in a manner that requires this Court to exercise its important power of supervision?

3. Does not the opinion below improperly apply and extend this Court's oft-cited "trilogy of cases" construing Rule 56, thereby violating plaintiffs' fundamental and important federal guarantee of jury trial of factual issues, by affirming a District Court decision which unquestionably weighed factual issues, derived its own adverse inferences, and resolved all doubts against the petitioner, all in a manner directly contrary to the law of this Court, the Eighth Circuit itself, and other Federal Courts of Appeal?

4. Should not all of plaintiffs' claims be reinstated for trial?

TABLE OF CONTENTS

III.

IMPROPERLY FAILED TO FOCUS ON THE UNDISPUTED EVIDENCE OF EMPLOYER MISCONDUCT AND CONCEALMENT OF A PLAN OF AGE DISCRIMINATION, WHICH BY ITS VERY NATURE SUPPRESSED THE TRUE FACTS AND JUSTIFIED TOLLING UNTIL THE PLAN WAS UNCOVERED FOR PETITIONER, AND OTHER VICTIMS. INSTEAD, THE DISTRICT COURT AND COURT OF APPEALS IMPROPERLY EXAMINED AND WEIGHED PLAINTIFF'S WORDS AND CONDUCT, IMPROPERLY WEIGHED EVIDENCE AND INFERENCES AGAINST HIM, THEREBY REACHING SUPPOSED "CONCLUSIONS OF LAW" ON WHAT WERE TRULY FACTUAL ISSUES FOR THE JURY... 16

II. UNDER PROPER APPLICATION OF RULE 56(c), THE CIRCUMSTANCES OF THIS CASE PRESENT PRECISELY THE SORT OF DISPUTED FACTUAL ISSUES WHICH THE SEVENTH AMENDMENT, THE DECISIONS OF THIS COURT, THE EIGHTH CIRCUIT, AND OTHER COURTS OF APPEALS REQUIRE TO BE RESOLVED BY A JURY..... 36

III. THIS COURT SHOULD AUTHORITATIVELY DECIDE THE PROPER REACH OF SUMMARY JUDGMENT WHEN IT IS URGED THAT THE STATUTE OF LIMITATIONS UNDER THE ADEA IS "EQUITABLY TOLLED" OR "EQUITABLE ESTOPPEL" SHOULD APPLY UNDER CIRCUMSTANCES SUCH AS ARE PRESENT HERE, AND SHOULD RESOLVE THE CLEAR CONFLICT AMONG CIRCUITS IN APPLICATION OF THE RULES OF TOLLING UNDER

TABLE OF CONTENTS TO APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

X.

Rules

No.

In the Supreme Court of the United States
OCTOBER TERM, 1990

LEO HEIDEMAN and SHIRLEY HEIDEMAN,
Petitioners,

VS.

PFL, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The decision of the Court of Appeals is reported at 904 F.2d 1262 (8th Cir. 1990) and is set out in the Appendix at A 1-A13. The unpublished order denying rehearing is set out at A30. The District Court's opinion of April 11, 1989 is reported at 710 F.Supp. 711 (W.D.Mo. 1989), and is set out at A31 - A79.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1990. A timely petition for rehearing was filed, which was denied on July 31, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE, RULE AND CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

The statute of limitations under the ADEA, 29 U.S.C. §626, provides in pertinent part as follows:

> (d) No civil action may be commenced by an individual under this section, until sixty (60) days after a charge alleging unlawful discrimination has been filed with the Equal Opportunity Commission.

Such charge shall be filed --

> (1) Within one hundred-eighty (180) days after the alleged unlawful practice occurred ....

(e)
(1) §255 and 259 of this title shall apply to actions under this chapter *

*29 U.S.C. §255 Statute of Limitations

Any action commenced ... under the Fair Labor Standards Act ... (a) if the cause of action accrues on or after May 14, 1947 -- may be commenced within two (2) years after the cause of action accrued, and every such action shall be forever barred unless commenced within two (2) years after the cause of action accrued, except a cause of action arising out of a willful violation may be commenced within three (3) years after the cause of action accrued;

Rule 56, Fed. R. Civ. P., provides in pertinent part as follows:

(c) Motion and Proceedings thereon. [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party in entitled to a judgment as a matter of law ....

STATEMENT OF THE CASE

Petitioners commenced this action November 25, 1987, in the Circuit Court

of Jackson County, Missouri. Defendant removed the case to the United States District Court for the Western District of Missouri, on January 4, 1988. The Complaint raised five claims: Age Discrimination (Count I); Violation of ERISA (Count II); Common Law Fraud (Count III); Intentional Infliction of Emotional Distress (Count IV); and Shirley Heideman's claim for loss of consortium (Count V). After discovery, defendant moved for summary judgment based solely on applicable statutes of limitation for each of plaintiffs' claims. By order dated April 11, 1989, the district court granted defendant's motion for summary judgment on all counts, including the state common law claims, based on statute of limitations. Jurisdiction in the district court was based on 28 U.S.C. §1331 (federal question) and 28 U.S.C.

§1332 (diversity jurisdiction).

Leo Heideman, born in 1926, was employed by PFL, a wholesale food distributor headquartered in Duluth, Minnesota, from 1964 until his discharge in June, 1979.[1] Mr. Heideman worked out of his home in Kansas City, and traveled to corporate headquarters in Duluth, approximately once a month.

Just before Christmas in 1976, while plaintiff was Vice President, Sales, for the Central division, he was informed by Carl Hill, just-appointed Senior Vice President of Marketing and Sales, that if he wished to stay with the company he would be required to move to the position of manager of the Memphis region. In a short conversation, "less than fifteen minutes," Mr. Hill told Heideman that he

---

[1] PFL, Inc. was the maker of Jeno's Pizza Rolls and other products.

simply "wanted his own man" as vice president in the Central region; and Hill wanted Heideman to build up the Memphis region. Mr. Heideman would not receive any reduction in pay, and he testified he believed Carl Hill's attitude was "positive about my move." Mr. Heideman accepted as sincere Hill's statements that Hill simply wanted individuals selected directly by him to serve as divisional vice presidents; and that he was needed by Hill to build sales in Memphis. Heideman decided to accept the relocation, testifying, "it wasn't a choice that I had any resentment over to move to Memphis."

Mr. Heideman advised defendant in early January, 1979 that he would accept the position in Memphis, and he began serving the Memphis region by traveling the area, although the Heidemans did not move there

until April, 1979.

On June 1, 1979 -- less than six weeks after the Heideman move, Heideman's immediate supervisor, John Parr, telephoned him and told him he was being terminated immediately. When Mr. Heideman asked why, Parr responded, "Because Carl Hill has made the determination that you don't fit into his plans," and "that was it." Heideman unsuccessfully sought to talk to Carl Hill, and the company owner Jeno Palucci, but this was refused.[2]

Importantly, Mr. Heideman testified that he really did not "have the

---

[2] Of course, what Mr. Heideman did not know was that he didn't "fit Carl Hill's plans" because he was in "the problem age," and thus had to be weeded out so Parr could earn his "non-quotaed" bonus, pursuant to the Hill memo, which sets forth in graphic detail the secret scheme of age discrimination that triggered this lawsuit. (see Appendix A to the District Court Opinion, 710 F. Supp., at 723-724).

slightest idea" who replaced him when he was fired on June 6, 1979, and he did not recall talking to anybody about who replaced him as regional manager in the Memphis area.

Mr. Heideman testified that after Parr refused to allow him to talk to Carl Hill or Jeno Palucci, and after his own futile attempts to reach them by phone, he set about trying "to find out exactly why Carl had instructed John to terminate me and exactly what the reason was." (Heideman Depo., 85). Mr. Heideman went to the NLRB in Memphis, Tennessee to see if he could get some help in forcing defendant to tell him the reason for his termination. Mr. Heideman was told that the agency could not help him, because an employer did not have to give a reason

for discharge.[3] The NLRB representative referred Mr. Heideman to a private attorney, who confirmed that the employer did not have to give him a reason for discharge. Importantly, Mr. Heideman testified that he learned, "I didn't have anything to stand on." (Heideman Depo., 126). The attorney offered to look into the matter if Mr. Heideman was willing to pay $70.00 per hour, but "he also told me that I had no legal recourse." Under those circumstances, Mr. Heideman testified that since he had just been discharged, had been stranded in Tennessee with no prospects for employment and "did not have the money to

---

[3] Mr. Heideman went to the NLRB because he knew that in Missouri he could demand a "service letter," which would achieve two things: (1) He could find out why he was terminated, and (2) he knew he could have a letter that might help him find another job: "Essentially, I was trying to find out why I was terminated."

retain him," it did not make sense to employ the attorney, so he did not pursue the matter.

In his visits to the NLRB and the attorney, "Nobody (attorney or NLRB) ever told me that I could file a charge of discrimination with anybody."[4] Heideman received a letter dated June 12, 1979 from Jeno Palucci, suggesting that Heideman was fired because he had not worked hard enough. Assessing Mr. Palucci's letter, Mr. Heideman testified, "I was groping to find out why the hell I was fired, seemed to me like somebody here was groping [also as to] why somebody . . . fired me, maybe somebody told him [Jeno] that stuff."

---

[4] It was stipulated below that Mr. Heideman knew nothing about his rights under ADEA, and "never suspected" he might have been the victim of age discrimination until the Hill memo fell into his hands years later.

Heideman testified that after going to see the NLRB, after seeing the attorney, after receiving the letter from Jeno Palucci, and after having no luck changing the attitudes expressed in Palucci's letter, Heideman did not recall making any other effort to find out why he had been fired, and he testified he did not believe there was anything more he could do. Heideman testified he had "no suspicion that he had been fired because of his age;" he "never considered the age thing as a reason;" and from the time John Parr told him in '79 that he "did not fit Carl Hill's plans" up until receipt of an unsolicited copy of Hill's "Read and Destroy" memo on August 29, 1986, Mr. Heideman did not have any way to dispute or disprove what Parr had told him. (Heideman Depo., at 178).

The termination was a shock; the

Heidemans were stranded in Tennessee with a new home and no income. They immediately decided to move back to Kansas City, where Mr. Heideman tried to find a job. He held full-time jobs until he began losing his eyesight due to diabetes in about 1984, gradually reducing to part-time, and then in-home employment. He is now unable to pursue outside employment, and is on social security disability.

On August 29 or 30, 1986, Mr. Heideman received an unsolicited copy of Hill's "smoking gun" memo. It was sent by Larry Williams, who had filed an age discrimination lawsuit against the same defendant on June 14, 1985, settling it in 1986 just before Williams mailed the memo to plaintiff.[5] Heideman had not in

---

[5] It must be emphasized that the memo was not turned over by the defendant to Mr. Williams during discovery, but was

any way been aware of Mr. Williams' lawsuit, or that it involved an age discrimination claim, until after he received the memo and talked to Mr. Williams. Mr. Heideman testified that until he received the unsolicited copy of Hill's memo, he in no way suspected that he may have been the victim of age discrimination, did not have any idea or suspicion that age had been any part of the reason for his discharge, and that "the earliest time" that he believed he had such facts to "put it all together"

---

obtained by Mr. Williams through a totally independent source, and revealed to Mr. Heideman by Williams' own initiative. Indeed, the record below included the fact that defendant tried to obtain all memo copies Williams and his lawyer had, offering additional settlement money to "seal the record" and bury the memo. Williams refused, and the memo found its way to Heideman and, later, to five other discharged employees whose later-filed actions survived summary judgment in the District of Minnesota.

to support a belief he had been deceived so as to have a lawsuit for fraud was upon receipt of the Hill memo. (Heideman Depo., at 178). Within two or three days of the receipt of the Hill memo, Heideman visited the EEOC, filed his charge of discrimination on September 5, 1986, and filed suit a little more than one year after receiving the Hill memo.

The Hill memo drips with intent to conceal the invidious policy of discrimination from intended victims. In addition to instructions to "Read and Destroy," Hill directs that employees in the "problem age" of 45 to 50 should be given innocent sounding, pretextual reasons for discharge: "telling him his future at Jeno's is limited," such that "no one needs to be the wiser and we would then be able to reorient that region with younger, more motivatable

personnel." True to Hill's insidious plan -- including explicit provisions to conceal the plan and its effects from the intended victims -- Mr. Hiedeman was "none the wiser," was duped into accepting the vague reasons for discharge (despite some misgivings), because under all the circumstances, he believed he "had no other recourse." During the same week Mr. Heideman was fired, two other well-performing employees in the "problem age group" also were fired.[6]

---

[6] Don Fifield and Ronald Schermerhorn filed age discrimination cases against the same defendant in 1988 -- nine years after their discharge. Yet their cases and the cases of Richard McFadden, Frank Faso, and William Brand remain alive and well in the United States District Bourt for the District of Minnesota, precisely because Judge Magnuson in the District of Minnesota held that the memo itself suggested employer misconduct and concealment of the claims, such that, "the court is unable to say that no issues of material fact remain to prevent defendants from being entitled to judgment."

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS OPINION, AFFIRMING SUMMARY JUDGMENT IN WHAT THE DISTRICT COURT CALLED "AN OPEN AND SHUT CASE OF AGE DISCRIMINATION," DIRECTLY CONFLICTS WITH OTHER CIRCUITS ON THE IMPORTANT FEDERAL QUESTION OF WHEN AFFIRMATIVE EMPLOYER MISCONDUCT RAISES FACTUAL ISSUES SO AS TO TOLL THE STATUTE OF LIMITATIONS UNDER THE ADEA AND FORBID SUMMARY JUDGMENT. AT THE VERY LEAST, THE EVIDENCE BY NO MEANS POINTED ALL DEFENDANT'S WAY, AND, THEREFORE, UNDER THE ESTABLISHED PRINCIPLE OF LAW THAT A PARTY RESPONSIBLE FOR WRONGFUL CONCEALMENT IS ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS AS A DEFENSE, THE DISTRICT COURT, AND THE COURT OF APPEALS IMPROPERLY FAILED TO FOCUS ON THE UNDISPUTED EVIDENCE OF EMPLOYER MISCONDUCT AND CONCEALMENT OF A PLAN OF AGE DISCRIMINATION, WHICH BY ITS VERY NATURE SUPPRESSED THE TRUE FACTS AND JUSTIFIED TOLLING UNTIL THE PLAN WAS UNCOVERED FOR PETITIONER, AND OTHER VICTIMS. INSTEAD, THE DISTRICT COURT AND COURT OF APPEALS IMPROPERLY EXAMINED AND WEIGHED PLAINTIFF'S WORDS AND CONDUCT, IMPROPERLY WEIGHED EVIDENCE AND INFERENCES AGAINST HIM, THEREBY REACHING SUPPOSED "CONCLUSIONS OF LAW" ON WHAT WERE TRULY FACTUAL ISSUES FOR THE JURY.

Truly there is little risk of overstatement in saying the factual and

legal circumstances of this case may be unlike any this Court has seen, or is ever likely to see again. Yet, petitioners recognize the danger that, amidst the crush of petitions received daily in this Court, this case could be shrugged off as merely one more isolated, individualized injustice, which is unimportant in the larger scheme of cases some feel this Court should review. Nothing could be further from the truth. This case cuts across many important areas of federal law which must be resolved authoritatively by this Court. The Eighth Circuit's opinion is in utter conflict with other circuits in construing the doctrines of equitable tolling and estoppel under ADEA statutes of limitations; as a result, the often-described "humanitarian," "remedial" purpose of this legislation has been

obliterated and the exact opposite of the required "expansive and liberal" construction of the ADEA is left in its wake.

Here, unlike most discrimination cases, a belatedly revealed, long concealed "smoking gun" memo gives black-and-white proof of a secret, purposeful plan of age discrimination. The Eighth Circuit gives lip-service to the doctrine allowing equitable tolling when there appears "[s]ome positive misconduct by the party against whom it is asserted." Yet, the Court astonishingly refuses to recognize that the "Read and Destroy" memo, with its self-contained directions for oppression of the discriminatory scheme, itself establishes such affirmative misconduct and fraudulent concealment by the employer that the evidence could by no means point all defendant's way on

whether defendant intended plaintiff (and others) to be lulled into inaction.

Years ago this Court, speaking through Justice Black, relaxed a statute of limitations based on the "maxim that no man may take advantage of his own wrong," a principle he described as "older than the country itself." Glus v. Brooklyn Eastern District Terminal, 359 U.S.231, 233 (1959). The Eighth Circuit, by contrast, failed to see how defendant's misconduct could have any effect on its statute of limitations defense:

> Whether or not an employer tells its employee the true reason for the adverse employment decision is not the standard. Nor is it especially relevant that, as the facts show, PFL has attempted to conceal its discriminatory actions.

(A15-16). Only this Court can correct this profound misstatement of law, for such misconduct is not only "relevant" but is at the very core and foundation of

the estoppel doctrine.

Nowhere does the Court of Appeals (or district court) recognize the fundamental rule applied in other circuits, that when equitable tolling or equitable estoppel is involved, summary judgment seldom is appropriate:

> In ADEA cases, equitable tolling or equitable estoppel almost invariably involves the credibility of the various witnesses and credibility is difficult to determine from affidavits or depositions .... Accordingly, summary judgment seldom will be appropriate when tolling is in issue.

Aronsen v. Crown-Zellerbach, 662 F.2d 584, 595 (9th Cir. 1981).

The following cases fall on plaintiffs' side of the ledger, and hold -- in sharp conflict to the opinion here -- that whether the two-year and three-year statutes of limitations under the ADEA, (and the 180-day EEOC filing period) may be tolled for equitable considerations

presents questions of fact preclusive of summary judgment: Meyer v. Riegel Product Corporation, 720 F.2d 303 (3rd Cir. 1983); Wilkerson v. Siegfried Insurance Agency, Inc., 621 F.2d 1042 (10th Cir. 1980); Dartt v. Shell Oil Company, 539 F.2d 1256 (10th Cir. 1976); Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981); Aronsen v. Crown-Zellerbach, supra, 662 F.2d 584 (9th Cir. 1981); Ott v. Midland Ross Corporation, 600 F.2d 24 (7th Cir. 1979); Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977); Ott v. Midland Ross Corporation, 523 F.2d 1367 (6th Cir. 1975); Coke v. General Adjustment Bureau, Inc., 640 F.2d 584 (5th Cir. 1981); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975); Cocke v. Merrill-Lynch & Co., Inc., 817 F.2d 1559 (11th Cir. 1987). All of the foregoing

cases recognize that whether the facts can be "reasonably construed so as to permit equitable estoppel or tolling is a factual question that requires factual development." Aronsen, supra, 662 F.2d, at 595. It is significant that the Eighth Circuit did not cite one single "deliberate misconduct" case among the many which petitioners painstakingly (yet vainly) brought to its attention. Instead, the Court cites inapposite ADEA "notice posting" and similar cases which do not even involve allegations -- much less the proof shown here -- of employer misconduct as the basis for tolling.

Reeb v. Economic Opportunity Atlanta, Inc., held that limitations do not begin to run until facts which would "support a cause of action are apparent," or should be apparent, "to a person with reasonably prudent regard for his rights." The Reeb

court specifically held that the conduct of the defendant in giving a misleading reason for discharge is a key determinant, under the principle espoused in Glus, supra,"that a party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense." 516 F.2d, at 930. Once a difficult showing of active misconduct is made -- as it has been in this case -- the law of equitable estoppel steps in and says that the wrongdoer will not profit from successfully carrying out its misdeeds of concealment:

> No man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.

Reeb, supra, 516 F.2d, at 930.

The Reeb court remanded for factual findings, making this important

observation:

> Secret preferences in hiring and even more subtle means of illegal discrimination, because of their very nature, are unlikely to be readily apparent to the person discriminated against. Indeed, employers that discriminate undoubtedly often attempt to cloak their policies with a semblance of rationality and may seek to convey to their victims an air of neutrality or even sympathy. <u>These tendencies may even extend to giving of misleading or false information to the victim</u>, as is alleged in the present case.

516 F.2d, at 931. The foregoing quotation sounds as if the <u>Reeb</u> court were reading from the explicit directives of the Hill memorandum to give misleadingly neutral, vague information to the victims of the discriminatory scheme, to cover-up the illegal plan so that "no one will be the wiser." It is vital to say that since the employer was aware of the ADEA (it gave affidavits below of duly posting "notice" to employees of their rights), the clear

inference Mr. Heideman was entitled to on summary judgment -- yet was denied by the opinion here -- is that the employer directed the cover-up to keep the company from being sued. Under all the cases cited herein yet ignored by the Eighth Circuit, if there is a "triable issue" suggesting the employer had a "design" to mislead plaintiff so as to conceal his cause of action, there simply is no doubt about it -- equitable estoppel applies. Yet, the Court of Appeals stunningly ignores this cover-up, sloughing it off as "not especially relevant." Interestingly, the last paragraph of the Eighth Circuit opinion dramatically illustrates why summary judgment should have been reversed -- even while the Eighth Circuit apologizes for not doing so:

> It is difficult to imagine a more offensive document in a case such as

> this than the "smoking gun" memorandum around which this cause of action centers, ... The memorandum evidences a deliberate and reprehensible company policy of discrimination against its older employees. The document even goes so far as to recommend bonuses for the managers charged with the policy's implementation, payment of which presumably would depend upon their success in getting older employees out of PFL ....

A27-28. The "deliberate and reprehensible policy" acknowledged by the opinion should have been the singular focus by which defendant's summary judgment motion should have failed.

Two cases deserve special note: Meyer v. Riegel Products Corp., supra, 720 F.2d 303 (3rd Cir. 1983), an ADEA case, and Richards v. Mileski, 662 F.2d 65 (D.C. 1981), a non-ADEA case. In Meyer, the Third Circuit held that not even plaintiff's suspicion of age discrimination at the time of his discharge, coupled with consultation with

an attorney soon thereafter, would conclusively bar the tolling of the statute of limitations. With proper acknowledgement of the "humanitarian " purposes of the ADEA and the limitations of summary judgment under Rule 56, the Third Circuit reversed and remanded for trial. The Opinion in Heideman is in absolute conflict with the persuasive Meyer holding. Meyer is vitally important because Meyer simply holds that circumstances such as those presented herein raise genuine issues of material fact preclusive of summary judgment.[7]

---

[7] The opinion here (and in the court below) gives conclusive effect to Heideman's consultation with a lawyer: "Heideman consulted a lawyer and declined his offer to pursue the matter ...." The Meyer court persuasively refused to give conclusive effect to such consultation:

> Indeed, perhaps the reason defendant has failed to cite any case in which a court permitted consultation with a lawyer to negate an allegation of employer deception is that such a

In Richards, an employee was forced to resign under duress of false charges of homosexual activity. The employee acknowledged that he was aware of the falseness of the charges in 1955, but he did not file his action until 1978, when he first became aware of knowingly false reports filed by investigators and his superiors that led to the charges and his subsequent forced resignation. Despite the plaintiff's knowledge in 1955 of the falseness of the charges against him (similar to the Court of Appeals conclusively hanging Mr. Heideman on his belief that "something was amiss" in that the reasons for discharge did not ring

---

> holding would be both strikingly inconsistent with the purposes of the anti-discrimination statutes and completely devoid of common sense.

720 F.2d, at 309. Also see Dartt v. Shell, supra, 539 F.2d 1256 (10th Cir. 1976).

true), and despite the twenty-three (23) year wait until plaintiff actually filed his action, the D. C. Circuit held that the facts did not justify dismissal, and did not conclusively show that plaintiff failed to exercise "due diligence" in discovering the material facts underlying the cause of action. 662 F.2d, at 71. As is true with Mr. Heideman, the plaintiff in Richards believed that he had been the victim of false charges at the time of his forced resignation, but it was not until plaintiff discovered the plot with the incriminating information, that the court held that he possessed sufficient knowledge so that his cause of action accrued. What degree of fraudulent concealment is necessary to invoke equitable tolling? According to the D. C. Circuit: "Any word or act tending to suppress the truth is enough."

661 F.2d, at 70.

The conflict and confusion among circuits is shown by those decisions in the Eighth Circuit and elsewhere, which inexplicably and arbitrarily sanction a trial court's role in determining "as a matter of law" what the other circuits consider inherently "factual matters" preclusive of summary judgment. See, e.g. Wilson v. Westinghouse Electric Corp., 838 F.2d 286 (8th Cir. 1988); English v. Pabst Brewing Company, 828 F.2d 1047 (4th Cir. 1987); Lawson v. Burlington Industries, Inc., 683 F.2d 862 (4th Cir.), cert denied, 459 U.S. 944, 103 S.Ct. 257 (1982); Vaught v. R. R. Donnelly & Sons Company, 745 F.2d 407 (7th Cir. 1984); Kazanzas v. Walt Disney World Company, 704 F.2d 1527 (11th Cir. 1983); Blumberg v. HCA Management Company, 848 F.2d 642 (5th Cir. 1988),

cert denied, 109 S.Ct. 789 (1989).

The fact that the rules for determining summary judgment were drastically violated below is unerringly established by a later ruling in another district court within the Eighth Circuit, wherein the district court denied summary judgment on precisely the same legal issues and factual circumstances, against the same defendant.[8] In McFadden, et al. v. ETOR Properties Limited (A80), the same defendant argued that "Heideman is indistinguishable from the instant case." District Judge Magnuson issued a decision exactly opposite to Judge Oliver, thus

---

[8] The case was decided December 26, 1989 -- after briefing to the Eighth Circuit, but before oral argument. The existence of this important, totally countervailing result was timely reported to the court well before argument and months before the decision; yet not one word is written about this anomaly of equal "justice" under the "rule of law" the Eighth Circuit professes to apply.

showing that the evidence could not "point all one way in defendant's favor" and that two "reasonable minds" could reach differing results.

As was pointed out to the Eighth Circuit during oral argument, the material, identical facts in the Heideman case and the Minnesota case begin and end with the Hill memorandum. As stated earlier, Fifield and Schermerhorn were fired the same week as Heideman. Heideman filed nearly two years earlier, but is barred from court while their actions proceed.

Because this is the rare case where plaintiff can prove both the discriminatory scheme and the plan to conceal it, thus raising at least triable issues of whether the limitations period should be relaxed or modified under the circumstances, Judge Magnuson's

recognition of the point is extremely telling for Heideman and all victims of the illegal plot:

> The Hill memorandum provides strong evidence that Jeno's not only had a policy of discriminating against older employees, but that Jeno's management took steps to conceal its policy.

A93-94. Judge Magnuson further held that "for tolling purposes" the following passages of the Memorandum are instructive:

> If by some chance we have men approaching the problem age, we should be willing and ready to help those men move on by making their exit from Jeno's a comfortable one. This would be accomplished by having a frank discussion with a man between 45 and 50, and telling him his future at Jeno's is limited and that it would be advisable for him to look for work elsewhere.
>
> * * *
>
> No one needs to be the wiser and we would then be able to reorient that region with younger, more motivatable personnel.

Judge Magnuson found that "this language

at least creates a genuine issue of material fact with respect to the existence of a deliberate design by the employer to prevent plaintiffs from filing a timely discrimination charge." (A95). The Judge also held that "the note on the memorandum, to read and destroy the document, supports this conclusion." (A95).

In short, based on the clear conflict between and among the circuit courts (and district courts)[9] as to how to apply the doctrine of tolling/estoppel in the

---

[9] District Judges Oliver and Magnuson reached opposite results on nearly identical facts, and indisputably identical legal issues. Other district courts also have refused to enter summary judgment where defendant's misconduct creates a genuine issue for tolling limitations: Potter v. Continental Trailways, Inc., 480 F.Supp. 207, 211 (D. Colo. 1979); Monnig v. Kennecott Corporation, 603 F.Supp. 1035 (D. Ct. 1985); Jones v. Premier Industrial Corporation, 611 F.Supp. 142 (N.D. Ga. 1985); Creamer v. General Teamsters Local 326, 560 F.Supp. 495 (D. Del. 1983).

context of summary judgment, and in light of the momentous fact that another judge has reached an entirely opposite conclusion than the judge in this case, petitioners respectfully suggest that this Court must intervene to resolve the conflict and provide clear guidance in line with the proper "rule of law." This Court also should intervene to prevent a miscarriage of the concept of "equal justice" under the rule of law, which is created by allowing five plaintiffs to go forward to trial, after having filed their charges and causes of action against the same defendant far later than plaintiff, while another court in the Eighth Circuit bars the doors to the Heidemans, under material facts and law indistinguishable for summary judgment purposes.

II.

UNDER PROPER APPLICATION OF RULE 56(c), THE CIRCUMSTANCES OF THIS CASE PRESENT PRECISELY THE SORT OF DISPUTED FACTUAL ISSUES WHICH THE SEVENTH AMENDMENT, THE DECISIONS OF THIS COURT, THE EIGHTH CIRCUIT, AND OTHER COURTS OF APPEALS REQUIRE TO BE RESOLVED BY A JURY.

Petitioners believe this case illustrates the disturbing tendency of district courts and courts of appeals to misconstrue and expand (capriciously, unfortunately) this Court's recent "trilogy" of decisions dealing with Rule 56(c). Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electrical Industrial Company v. Zenith Radio Corp., 475 U.S. 574 (1986).[10] A reading of this Court's

---

[10] The district court states, "This trilogy of cases clearly advocates a more liberal use of summary judgment." (emphasis added). 710 F.Supp., at 713. (A35); the Court cites an Eighth Circuit case espousing a view that this Court is

actual holdings shows (1) no mention whatsoever of "advocating a more liberal use of summary judgment"; (2) there is, in fact, no change whatsoever in the extremely heavy burden imposed on a party moving for summary judgment. In Celotex, for instance, Chief Justice Rehnquist merely disapproves of cases which previously regarded summary judgment as a "disfavored remedy" rather than "an integral part of the Federal Rules as a whole ...." 477 U.S., at 327. In Anderson v. Liberty Lobby, Inc., Justice White first reiterated the clear rule that, at the summary judgment stage, the trial judge's function is not to weigh the evidence and determine the truth of the matter -- as was improperly done in

---

directing appeals courts to be "somehwat more hospitable to summary judgments than in the past." City of Mt. Pleasant v. Associated Elec. Corp., 838 F.2d 268, 273 (8th Cir. 1988).

the district court and by the court of appeals -- but to determine only whether there should be a trial:

> The inquiry performed is the threshold inquiry of determining whether there is a need for trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact, because they may reasonably be resolved in favor of either party.

Anderson, 106 S.Ct., at 2511.

The actual holding in Anderson was that the heightened "clear and convincing" standard of proof for actual malice should be applied at the summary judgment stage in a libel action involving a public figure. Most important, far from advocating "more liberal use of summary judgment," Justice White warns against trial courts acting "other than with caution in granting summary judgment":

> Our holding that the clear and convincing standard of proof should be taken into account in ruling on summary judgment motions does not

> denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes, 398 U.S. at 158-159,.... Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Anderson, 106 S.Ct. at 2513-14 (Emphasis supplied).

In Hillebrand v. M-Tron Industries, Inc., 827 F.2d 363 (8th Cir. 1987), an ADEA case decided after the Supreme Court "trilogy," the Eighth Circuit reversed summary judgment and remanded for plenary trial on a claim under the ADEA, making the following important observations:

Summary rulings are the direct

> antithesis of the full and fair process found in an adversary proceeding .... Summary judgment should be sparingly used, and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion. Summary judgment should seldom be used in cases alleging employment discrimination, because of the special category in which Congress and the Supreme Court visualize these cases ....
>
> * * *
>
> In the present case, the trial court held that the extreme remedy of summary judgment was required. In doing so, the judge should have viewed all of the facts in a light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences to be drawn from those facts .... We are convinced that he failed to do so.

(Emphasis added). 827 F.2d, at 364-65.

Space limitations will not allow the petitioners to show here all of the ways in which the district court violated the rule of Hillebrand (and all courts) by weighing evidence and improperly construing the record against the

plaintiffs. Moreover, neither the district court nor the Eighth Circuit mentions the "special category in which Congress and the Supreme Court visualize ..." employment discrimination cases.

Petitioners believe the opinions below read like "findings of fact" by a trier of fact, and thus prove on their face that summary judgment standards were violated.[11] A couple of examples are

---

[11] See the district court "conclusions": "Given the foregoing facts and circumstances surrounding Mr. Heideman's termination, we find and conclude the there were sufficient facts so that a reasonably diligent employee would have been put on notice of his cause of action." 710 F.Supp., at 720 (A67-68); "There is ample evidence that plaintiff did not rely upon the pretextual reason given, it was plaintiff's own lack of diligence that led him to the present impasse;" (A-69). Compare the Eighth Circuit's factual findings: "The Heidemans have not adduced facts to show that the delayed filing was due to the employer's concealment, misrepresentation...."; "There is nothing on the record to indicate that the company successfully misled Heideman or prevented him from

illustrative.

First, both the district court and Court of Appeals seize on the truly immaterial "fact" that when Hill reassigned Heideman to Tennessee he was replaced by Ed Korkki, who was significantly younger than plaintiff. Why the Court of Appeals and district court emphasized the "demotion" is hard to figure out -- until one realizes that both courts wanted to weigh this as a factor supposedly putting Heideman "on notice" that age discrimination already was at work, with one element of a prima facie case supposedly known and appreciated by him.[12] A further key

---

discovering or pursuing his rights under the ADEA;" (A7).

[12] But the facts favorable to Mr. Heideman -- completely missing from both decisions -- are that he willingly accepted the transfer, accepted as sincere Hill's statements that he would be allowed to build up the Memphis

circumstance which was ignored below but which would be available for development at trial is that people were routinely moved, transferred, demoted and fired at Jeno's. This was key evidence emphasized in the Minnesota case and here, since Mr. Heideman testified there were "a lot of personnel changes, it was kind of like spinning the wheel." Why did the Court of Appeals and district court not emphasize Mr. Heideman's utter lack of knowledge regarding who replaced him at the time of his termination, since the record is unclear as to what he knew, when he knew it, and whether he had "any idea" other than guesswork? The omission is significant, because under the Court

---

region, and that Hill simply wanted his own man as vice president. Mr. Heideman testified he had absolutely "no resentment" over the move or Mr. Korkki replacing him, and believed Hill was being "positive" about the move.

of Appeals opinion, it is the termination date which triggered all kinds of conclusive, constructive notice to Mr. Heideman of the accrual of all of his causes of action.

Another glaring example of weighing facts and inferences against the plaintiff arises from the Eighth Circuit's misstatement of fact regarding Heideman's visit to an attorney:

> The lawyer offered to pursue the matter, but Heideman declined because of the cost. (A-4); The cost of engaging private legal services, however, does not justify equitable tolling. If it did, the 180-day limitations period would be rendered largely meaningless. (A20).

The district court and Court of Appeals totally ignored what the record as a whole showed -- when weighed in Mr. Heideman's favor -- namely, 1) that the attorney advised Mr. Heideman that he did not think he would be able to be of any

help; and 2) after Mr. Heideman's trip to the NLRB and the attorney, he believed he "had no legal recourse," and that the employer's reasons for discharge apparently were legally sufficient, since the employer did not have to give (or even have) a reason for discharge, and thus he "didn't have anything to stand on." (Depo., 125-26).[13]

The Seventh Amendment provides that in suits like this "the right of trial by jury shall be preserved,...." Of late, Justice Rehnquist has provided a most

---

[13] Making adverse findings and inferences against plaintiff also was underscored by the district court's improper "findings" that "if plaintiff had not slept on his rights" and had "moved with greater dispatch to pursue the true reasons for his firing," the statute of limitations would not have run. The facts and circumstances do establish that Heideman did take action "to pursue the true reason for his firing," but he testified he was met with roadblocks and misdirections which caused him to remain "none-the-wiser" in believing he "had no recourse."

eloquent tribute to the "valued" and "fundamental" right to a jury trial in civil cases, in his dissent in Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322, 346 (1979):

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence ... any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

This Court's decisions reiterating the limitations on summary judgment, plus the earlier-cited cases from other circuits holding that tolling questions involve factual determinations, all establish that the conflicting evidence and inferences here should have been resolved by a jury. Certiorari must be granted to correct this glaring error.

III.

THIS COURT SHOULD AUTHORITATIVELY DECIDE THE PROPER REACH OF SUMMARY JUDGMENT WHEN IT IS URGED THAT THE STATUTE OF LIMITATIONS UNDER THE ADEA IS "EQUITABLY TOLLED" OR "EQUITABLE ESTOPPEL" SHOULD APPLY UNDER CIRCUMSTANCES SUCH AS ARE PRESENT HERE, AND SHOULD RESOLVE THE CLEAR CONFLICT AMONG CIRCUITS IN APPLICATION OF THE RULES OF TOLLING UNDER THE ADEA, AND INCONSISTENT APPLICATION OF RULE 56 ON SUMMARY JUDGMENT, SO AS TO AVOID THE GROSS MISCARRIAGE OF JUSTICE SUFFERED BY PETITIONERS.

A theme running through the Eight Circuit's and the district court's opinions is that because Mr. Heideman "made some efforts to determine the truth, including contacting an attorney," this somehow conclusively establishes that "Heideman had the means to get the truth he sought, but chose not to take advantage of the opportunity ...." Of course, this is in direct contrast to the law in Dartt v. Shell Oil, supra., and Meyer v. Riegel, supra., which soundly

reject any notion that contacting an attorney conclusively prevents a statute of limitations from being tolled. The judicial fiat by the district court and Eighth Circuit also begs the fundamental, material factual issue of whether Mr. Heideman exercised due diligence under all of the circumstances -- giving him the benefit of the doubt.

The only way the attorney could have helped Mr. Heideman determine the "true reason for his termination" would be to file a legal action against the employer. It is a material factual issue whether the attorney, had Mr. Heideman had the wherewithal to retain him, would have been able to uncover the "reprehensible scheme of discrimination," especially in view of the undisputed evidence that "PFL has attempted to conceal its discriminatory actions." (A16). The

burden should have been on defendant to show "conclusively" that Heideman could have discovered facts sufficient to timely file, if he had retained the attorney or otherwise pursued his inquiry. Instead, all doubts were resolved against him.

Interestingly, in Foster v. Johns-Manville Sales Corporation, 787 F.2d 390 (8th Cir. 1986), the author of the Eighth Circuit's opinion herein reversed summary judgment, where a statute of limitations defense raised what the court determined on appeal was the material factual issue:

> Whether in the exercise of reasonable diligence Mr. Foster should have known of the cause or his condition and of defendant's alleged wrongful acts in regard thereto more than two years before this action was filed.

787 F.2d, at 391. In Foster, the plaintiff knew he had asbestosis in 1972, yet did not file until years later. The

Eighth Circuit reversed summary judgment in language perfectly applicable to the Heideman case:

> Issues of due diligence and constructive knowledge depend on inferences drawn from the facts of each particular case .... When conflicting inferences can be drawn from the facts, summary judgment is inappropriate. Snyder v. United States, 717 F.2d 1193, 1195 (8th Cir. 1983). Whether in the exercise of reasonable diligence Mr. Foster should have known before March 12, 1980, the cause of his condition, and of defendant's wrongful acts in regard thereto, is a disputed factual issue properly left for the jury.

(Emphasis supplied). 787 F.2d, at 391. See also Williams v. Hartje, 827 F.2d 1203 (8th Cir. 1987).[14]

---

[14] One of the cases cited against Mr. Hiedeman in the Eighth Circuit's opinion actually involved a question of tolling of the ADEA statute of limitations -- and the district court submitted the question to the jury for resolution, which is all Heidemans have been requesting from the very beginning. See Walker v. St. Anthony's Medical Center, 881 F.2d 554, 556-57 (8th Cir. 1989).

An important policy question is involved here: Does going to a lawyer because someone has a vague suspicion he is not being told the whole story conclusively begin the running of statutes of limitations? How can the Court of Appeals be allowed to jump to the conclusion that even if Heideman blindly had begun a lawsuit, that the Hill memorandum or other proof of age discrimination would have surfaced, so as to serve the humanitarian purpose of the ADEA to root out discrimination?[15] This Court, the court of last resort, must grant certiorari to review the generally important issues this case raises.

---

[15] Again, it must be emphasized that the Hill memo was obtained from Larry Williams, who in turn obtained it from independent sources -- not from defendant in discovery. This important fact requires full development at trial, and not the "rush to judgment" apparent in this case.

IV.

THIS COURT SHOULD AUTHORITATIVELY DECIDE THE IMPORTANT POLICY QUESTION UNDER FEDERAL LAW OF WHETHER A PERSON CAN BE HELD CONCLUSIVELY ON "NOTICE" OF POTENTIAL CAUSES OF ACTION SO AS TO START THE RUNNING OF STATUTES OF LIMITATIONS, DESPITE DEFENDANT'S WRONGFUL CONCEALMENT AND MISDIRECTION REGARDING THE FACTUAL BASIS THEREOF, PARTICULARLY WHEN THE VICTIM INDISPUTABLY HAD NO SUSPICION WHATSOEVER THAT A VIOLATION OF LAW HAS OCCURRED, MAKES LIMITED INQUIRY INTO HIS RIGHTS, AND ACTS IN CONFORMITY WITH A LAWYER'S ADVICE THAT THERE IS NOTHING HE CAN DO. THIS COURT MUST AUTHORITATIVELY DECIDE WHETHER UNDER ALL CIRCUMSTANCES PETITIONER'S ACTIONS CAN BE DECLARED "UNREASONABLE" AS A MATTER OF FEDERAL LAW, OR WHETHER THE "REASONABLENESS" OF PETITIONER'S ACTION OR INACTION MORE PROPERLY MUST BE FOR A JURY TO DECIDE.

The Court of Appeals totally distorts petitioners' tolling argument:

> The Heidemans argue that PFL affirmatively concealed from Leo Heideman the reason for his discharge <u>because it did not tell him he was fired for being too old</u>.

(A15). This is a damaging distortion, and the opinion's phraseology is very telling in proving that the courts below

construed facts, inferences and arguments against the plaintiffs. The Court of Appeals' characterization is taken verbatim from defendant's characterization of the misconduct argument. It distorts what the Heidemans argued in such a way that one's first reaction is to say, "Of course, that's ridiculous, that cannot be the law or else everyone would be able to argue tolling ...." The Court goes on to state:

> Whether or not an employer tells its employee the true reason for the adverse employment decision is not the standard.

Agreed; for in the normal case, mere pretextual statements would not support equitable estoppel. But this is not the normal case, and the Heidemans did not argue below as the Court of Appeals characterizes. As pointed out earlier, where the Eighth Circuit goes completely

astray of the law and logic, is with its next statement:

> Nor is it especially relevant that, as the facts show, PFL has attempted to conceal its discriminatory actions.

(A16). All of the cases cited earlier are in utter conflict with this statement of law.

The answer to this subtle "opening of the flood gates" argument (which was made by the defendant and accepted by the district and appeals courts) is as follows: (1) First, whether to grant equitable relief from the statutory provisions is a matter that should be determined "on a case-by-case basis, depending on the equities of each case"; (A67, n. 17) (2) the floodgates sophistry fails because we have here "the rare case," where there is proof positive, not only of the plan to discriminate, but also the plan to mislead the employees

and conceal the discriminatory plan itself. In such case, the law, "the equities," and statutory policies strongly balance plaintiffs' way -- at least insofar as creating a genuine, material factual issue for trial; (3) because this is not the typical case of a plaintiff seeking to prove discrimination through circumstantial evidence and pretextual reasons for discharge, hoping to thereby "boot-strap" himself around late filing, the law of equitable estoppel properly requires plaintiffs to prove the plan to conceal. Most plaintiffs cannot; here, petitioners can, and should be allowed their day in court.

Under the proper standards for summary judgment it was impossible for the courts below to conclude that the evidence pointed all defendant's way on the factual issue of whether plaintiff

"actually relied" on the alleged statements and misrepresentations by the employer. Mr. Heideman testified that until he received the Hill memo in 1986, he did not believe he had any way to disprove what John Parr had told him as to the reasons for discharge. A jury certainly could reasonably conclude that Mr. Heideman ultimately did "reasonably rely" on the reasons given for this discharge, even though they "didn't make sense" and he "thought something was amiss," because he had been told that he "had no legal recourse," so that "there wasn't a damn thing" he could do.

In this age of Rule 11, important policy questions undercut the Court of Appeals' affirmance of summary judgment on the ERISA and state law claims, as well. On the ERISA claim, the Court of Appeals states that the cause of action

accrued when Heideman was terminated in 1979, because "the Heidemans were aware of all of the facts that would put reasonable persons on notice that they had an actionable claim."[16] (A22). On these "facts" the Court of Appeals holds the Heidemans should have had enough information to begin a lawsuit in 1979:

> They knew of their health problems, they understood that PFL was aware of their health problems, and they recognized that Leo Heideman had been fired without a legitimate reason.

(A22). The Heidemans' ERISA action is based on Section 510, making it illegal to fire employees to prevent them from receiving ERISA benefits. The Heidemans would have been promptly dismissed from court if they would have filed an action based on the flimsy "facts" the Eighth

---

[16] Terms such as "reasonable persons" sound ringingly like issues for the finder of fact.

Circuit endorses in its opinion.[17] What was missing before receipt of the Hill memorandum was the first-time revelation of defendant's motive and attitude linking ill health in general to plaintiffs' "problem age group" which defendant secretly schemed to eliminate. Until that time, on the undisputed record, petitioners had no clue whatsoever of the defendant's wrongful "specific intent" which linked advancing age to susceptibility to injury, etc.

Certiorari must be granted to review the choice of law question, which is given short shrift by the Court of Appeals. This is a due process "minimum

---

[17] Under the ERISA, a violation of Section 510 requires that the plaintiffs show "specific intent." See Dister v. Continental Group, Inc., 859 F.2d 1108 (2nd Cir. 1988) (summary judgment affirmed); Gavalik v. Continental Can Company, 812 F.2d 834, 851 (3rd Cir. 1987).

contacts" question, because plaintiff was only in Tennessee for a short period of time, and was fraudulently moved down there by defendant, who hoped he would quit.[18] The appeals court rejects the argument that the "smoking gun" memo affected the fraud claim, and in so doing the Court of Appeals either misstated or erroneously ignored the record:

> The district court has found, and we agree, that the cause of action accrued when Heideman was fired. He was then aware that he had been transferred and, in short order, fired, and that PFL knew he had refused previous promotion offers because he did not want to move from Kansas City. The memorandum told him nothing new that was relevant to

---

[18] It was established in the record below that Mr. Heideman had turned down requests made several times during his career that he move to corporate headquarters in Duluth. That defendant hoped (or thought) Heideman would quit rather than accept the transfer is disclosed by the memo itself, in which Hill states that after the age of 50, a man "becomes a liability" in that he "becomes less responsive to job change, i.e. no more transfers, ..."

> his fraud claim; it did not even mention demotions or transfers.

(Emphasis supplied) (A26). Contrary to the Court of Appeals' "finding" of facts against Mr. Heideman, the memo provided the key missing element for fraud, proving that defendant knew it was lying to Heideman at the time defendant falsely told him he was being transferred to Memphis to build up the region, etc. After being fired a short time later, Mr. Heideman only knew that there had been a breach of Hill's promises. Until he received the memo, disclosing that Hill believed men in Heideman's age group were "less responsive to job change, i.e. no more transfers," a reasonable jury could conclude that Mr. Heideman did not until that time know that fraud had occurred. Under Missouri law, Mr. Heideman had a total of fifteen (15) years to file his

claim of fraud.[19] Where fraud is alleged, the due diligence requirement "does not go so far as to require the exhaustion of all available means to ascertain the truth" of the representations, "but demands reasonable care, which is a jury question." DeLong Equipment Company v. Washington Mills Abrasive Company, 887 F.2d 1499, 1519-20 (11th Cir. 1989). Missouri law likewise protects the victim of fraud. See Iota Management Corp. v. Boulevard Investment Company, 731 S.W.2d 391, 412-15 (Mo. App. 1987); Essex v. Getty Oil Company, 661 S.W.2d 544, 550 (Mo. App. 1983).

In short, the "smoking gun" memo not only goes to the merits of proving the

---

[19] See Kansas City v. W. R. Grace & Co., 778 S.W.2d 264 (Mo. App. 1989) (Summary judgment reversed in a case involving statute of limitations issues, finding "a genuine issue of fact exists when there is the slightest doubt about a fact.")

discrimination, fraud and denial of benefits claims at issue, but undeniably also shows the clear intent to conceal the illegal plan from the victims, leading to logical and allowable inference -- totally ignored by the appeals court -- that suppression was intended to derail lawsuits. Should certiorari be granted on any question, petitioners urge a plenary review of the entire case.

CONCLUSION

The closing paragraph of the Court of Appeals' opinion indicates a belief that this case could be decided in the Heidemans' favor only based on "sympathy." Not so. The Heidemans' case is fully supported by "the rule of law" by which the Court of Appeals assertedly reaches its decision. Plainly and simply, petitioners are entitled under

law to have their day in court. They do not claim that their version of facts is the only version, but it has been shown that there are genuine factual disputes which can and must be resolved only by a true finder of fact. It is true that Congress has evinced a policy to resolve discrimination suits in a relatively short period of time, beginning with administrative filing and comtemplated concilation efforts. However, there is a built-in balancing of interests under the discrimination law, so that the Leo Heidemans of the world are not required to pursue difficult, expensive legal action with very little knowledge, scant resources, and only a vague suspicion that "something is amiss." Instead, bringing causes promptly is rightly outweighed by the more important public policy concern of assuring that the PFLs

of the world cannot violate the law with impunity. For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

DENNIS E. EGAN
Counsel of Record
Missouri I.D. No. 27449
POPHAM, CONWAY, SWEENY,
FREMONT & BUNDSCHU, P.C.
1300 Commerce Trust
Building
922 Walnut Street
Kansas City, MO 64106
(816) 221-2288

Attorneys for Petitioners

TABLE OF CONTENTS TO APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-1645

Leo Heideman and Shirley Heideman,	*	
	*	
Appellants,	*	Appeal from
	*	the United
v.	*	States
	*	District
PFL, Inc.,	*	Court for
	*	the Western
Appellee.	*	District of
	*	Missouri.

Submitted: February 16, 1990

Filed: June 5, 1990

Before ARNOLD and BOWMAN, Circuit Judges, and STROM,* District Judge.

BOWMAN, Circuit Judge.

Leo and Shirley Heideman appeal from an

order of the District Court[1] granting summary judgment in favor of PFL, Inc., on the Heidemans' age discrimination claims relating to Leo Heideman's discharge by his employer PFL. Heideman v. PFL, Inc., 710 F. Supp. 711 (W.D. Mo. 1989). We affirm.

Leo Heideman, who was born in 1926, was employed by PFL,[2] a wholesale food distributor headquartered in Duluth, Minnesota, from 1964 until his discharge in 1979. During most of that time, his office was in his home in Kansas City.

---

*The HONORABLE LYLE E. STROM, Chief Judge, United States District Court for the District of Nebraska, sitting by designation.

[1]The late Honorable John W. Oliver, Senior United States District Judge for the Western District of Missouri.

[2]At various times pertinent to this litigation, PFL's corporate name also has been Northland Foods, Inc., and Jeno's, Inc.

Late in 1978, at which time Heideman held the position of vice president of sales for the central division, he was informed by Carl Hill, PFL's senior vice president of marketing and sales, that, if he wished to stay with the company, he would have to take a demotion to the position of regional manager and immediately relocate to Memphis, Tennessee. His salary would not be cut. Heideman agreed, and was replaced by Ed Korkki, born in 1940. On June 1, 1979, soon after he moved permanently to Memphis, Heideman was fired. John Parr, the company's vice president of sales, told Heideman that he did not fit Carl Hill's plans. Heideman, dissatisfied with that explanation, wanted someone at PFL to tell him why he was fired. He attempted unsuccessfully to contact company executives, seeking clarification, wanted

someone at PFL to tell him why he was fired. He attempted tnsuccessfully to contact company executives, seeking clarification. He visited the offices of the National Labor Relations Board (NLRB) in Memphis, where he says he was told the company did not have to give him a reason for termination. Heideman claims that he was not told of the protection afforded employees over forty years old under the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621-634. He also met with a Memphis lawyer, whose name Heideman does not recall. The lawyer confirmed that the law did not require PFL to give Heideman a reason for discharge. The lawyer offered to pursue the matter, but Heideman declined because of the cost. Heideman received a letter dated June 12, 1979, from Jeno Palucci, chairman of the

board of PFL, intimating that Heideman was fired because he had not worked hard enough. Heideman's pursuit of the truth ended there.

On August 29, 1986, having returned to Kansas City to live, Heideman received by mail a copy of a PFL memorandum dated December 21, 1978, a date just prior to his demotion. It was sent to him by Larry Williams, a former PFL employee who had successfully settled an age discrimination suit against PFL. This "smoking gun" memorandum, from Carl Hill to Dick Jones, president of PFL, described a policy designed to rid the company of older managers and articulated the characteristics that made such employees a liability to the company. It included a handwritten instruction (author not established) to "Read and destroy."

On September 5, 1986, Heideman filed a charge of age discrimination against PFL with the Equal Employment Opportunity Commission (EEOC). On November 25, 1987, the Heidemans filed suit in Jackson County, Missouri, Circuit Court. PFL removed the case to federal court.

The Heidemans' complaint sounded in five counts: one count each under the ADEA and the Employee Retirement Income Security Act (ERISA), and three state cnmmon law counts--fraud, intentional loss of consortium. The District Court, on motion of PFL, granted summary judgment in favor of the company on all counts, within the applicable statutes of limitations. The District Court also determined that equitable tolling to extend the limitations periods was inappropriate in this case. Although PFL's conduct toward Heideman and other

older employees appears to have been egregious, we find no error in the conclusions of the District Court.

The parties do not agree on the correct standard of review in this case. In connection with that difference of opinion, we have before us appellants' motion to strike, filed after oral argument, which we agreed to take with the case.

On February 15, 1990, one day before oral argument in this case, PFL submitted what it called a "supplemental letter brief." PFL indicated that it had misstated the applicable standard of appellate review in its main brief and suggested what it believes is the proper standard. On March 21, 1990, counsel for the Heidemans moved to strike that letter and asked us not to consider it. The unusual contention, in essence, is that

PFL's supplemental argument was neither raised nor considered below, so it should not be considered on appeal absent extraordinary circumstances. To our knowledge, no appellate court requires issues concerning its own standard of review to be raised in the trial court, and we find the suggestion that this is necessary to be entirely without merit. Appellants' motion is denied.

We are not persuaded, however, by the argument PFL makes in its supplemental brief. We review the grant of a motion for summary judgment under the same standard applied by the district court. McCuen v. Polk County, Iowa, 893 F.2d 172, 173 (8th Cir. 1990) (citing Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986)); Elbe v. Yankton Indep. School Dist. No. 1, 714 F.2d 848, 850 (8th Cir. 1983); see Fed. R. Civ. P. 56(c). To

affirm the district court "we must agree that there is no genuine issue of material fact, viewing the facts in the light most favorable to the nonmoving party, and that the moving party is entitled to judgment as a matter of law." McCuen, 893 F.2d at 173.

PFL's argument is that we should view the District Court proceeding in this case not as a hearing on a motion for summary judgment but as a trial on the factual issues of equitable tolling. See Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 718 (8th Cir. 1982). If we were to do so, we could not reverse unless we found the District Court's fact-finding to be clearly erroneous. Id. In Hrzenak, however, the authority upon which PFL bases its argument, this Court found that "both parties treated the proceeding as a trial on the factual

issues underlying [appellant's] claim for equitable tolling." Id. That is not the situation here. The fact that the parties here stipulated that depositions should be regarded as personal testimony under oath does not, as PFL suggests, convert argument on the summary judgment motion into a trial. At the oral argument of this appeal, counsel for the Heidemans emphasized that it was not his intent to waive jury trial on the issue of equitable tolling by defending against PFL's summary judgment motion, and there is nothing in the record to persuade us otherwise. We, therefore, will review this matter under the same summary judgment standard that the District Court used in reaching its decision.

In the order, the District Court made a thorough review of recent Supreme Court decisions dealing with Rule 56(c).

Heideman, 710 F. Supp. at 713-14; see Celotex Corp. v. Catrett, 477 U.S. 317, 322-27 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-55 (1986); Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). To restate briefly the teaching of those cases, summary judgment is appropriate when there remains no genuine issue of material fact upon which a reasonable jury could find in favor of the nonmoving party. While the moving party on a motion for summary judgment is responsible for demonstrating to the court why there is no genuine issue of material fact, the nonmoving party must go beyond the face of his complaint to show that a rational jury could return a verdict in his favor. We hold, as did the District Court, that the Heidemans did not make a sufficient showing to

withstand PFL's motion for summary judgment on statute of limitations grounds.

Each of the counts in this suit is subject to a statutory limitations period.[3] As the District Court determined, and as we agree, the Heidemans filed their lawsuit outside the limitations period on all counts, and Leo Heideman's age discrimination charge with the EEOC, prerequisite to suit under the ADEA, was lodged well beyond the permitted 180 days after the discriminatory act. See 29 U.S.C. § 626(d) (1982). But because none of these

---

[3]The District Court thoroughly and accurately discusses the applicable statutes. Although there is some disagreement, based on choice of law considerations, between the parties as to the correct statutes of limitations on the common law counts, we agree with the District Court's conclusions on all counts. See Heideman, 710 F. Supp. at 721-22.

statutes of limitations, including the 180-day limit under the ADEA, is jurisdictional, they all may be extended by equitable tolling. With respect to the ADEA, see EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 123-24 (1988) (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755 (1979)) ("[T]he filing provisions of the ADEA and Title VII are 'virtually in haec verba,' the former having been patterned after the latter."); Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC [under Title VII] is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."); see also Walker v. Saint Anthony's Medical Center, 881 F.2d 554,

556-57 (8th Cir. 1989) ("[T]he timely filing of a charge with the EEOC [under the ADEA] is not a jurisdictional requirement and is subject to waiver, estoppel and equitable tolling.")' DeBrunner v. Midway Equip. Co., 803 F.2d 950, 952 (8th Cir. 1986) ("The ADEA's 180-day filing requirement is in the nature of a statute of limitations and may be subject to equitable tolling.").

Turning to the ADEA count, it is uncontroverted that Heideman failed to file his EEOC charge within 180 days of the discriminatory act (his discharge), so we need to decide only whether summary judgment was appropriate on the issue of equitable tolling. We hold the District Court was correct in concluding that the Heidemans failed to come forward with facts that, if proved at trial, could support equitable tolling of the 180-day

limitations period.

Equitable tolling is appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his hands. Hill v. John Chezik Imports, 869 F2d 1122, 1124 (8th Cir. 1989) (Title VII case). "Equitable tolling arises upon some positive misconduct by the party against whom it is asserted." DeBrunner, 803 F.2d at 952 (ADEA case).

The Heidemans argue that PFL affirmatively concealed from Leo Heideman the reason for his discharge because it did not tell him he was fired for being too old. We have no doubt that is so. No employer is likely to admit to the disadvantaged employee a flagrant violation of a federal law against discrimination on the basis of age, race, or gender. Whether or not an employer

tells its employee the true reason for the adverse employment decision is not the standard. Nor is it especially relevant that, as the facts show, PFL has attempted to conceal its discriminatory actions. The Heidemans have not adduced facts to show that the delayed filing was "due to the employer's concealment, misrepresentation or failure to post adequate notice." Nielsen v. Western Electric Co., 603 F2d 741, 743 (8th Cir. 1979). There is nothing on the record to indicate that the company successfully misled heideman or prevented him from discovering or pursuing his rights under the ADEA. He concedes he was on notice from the very beginning that something was amiss. Indeed, Heideman has admitted repeatedly that he was certain at the time that he was not being told the true reason for his discharge. He

even made some efforts to determine the truth, including contacting an attorney. Although he knew that he was not told the truth about his discharge, he quit looking for the answer and allowed the limitations period to run.

A survey of ADEA cases from this circuit where issues relating to the equitable tolling of statutes of limitations were decided on defendants' motions for summary judgment convinces us that the District Court was correct in this case.

This Court upheld summary judgment on the equitable tolling issue in a case where the discharged employee was not told that his job was being eliminated and was told that his supervisors were seeking another position for him within the company. Wilson v. Westinghouse Elec. Corp., 838 F.2d 286, 288 (8th Cir.

1988). Here, Heideman was aware that, when he was demoted, he was replaced by Ed Korkki, who Heideman believed was fifteen to twenty years younger than himself. Heideman knew that PFL had fired him, and that the company did so without adequate time to evaluate -- and to find wanting -- his performance in his new position as regional manager. No one told him he would be assisted in finding another job with PFL so as to lead him to believe he was just being reassigned.

In DeBrunner, the employer had not posted the required notice concerning an employee's rights under the ADEA, see 29 U.S.C. § 627 (1982), but we affirmed summary judgment for the defendant because the discharged employee had a general awareness of his rights "or the means of obtaining such knowledge." DeBrunner, 803 F.2d at 952. In this

case, uncontroverted affidavits presented by PFL show that the company posted the statutory notice at its headquarters, and Heideman acknowledged trips to that location at least once per month. If he did not see the notice (he says he does not remember seeing it), that failure is not grounds for tolling the statute since he had "reasonable access" to the notice. Hrzenak, 682 F.2d at 718.

In another ADEA case, this Court found that the limitations period was not subject to tolling despite the employee's allegations "that he was unassisted by counsel, unable to find a lawyer, and unfamiliar with the legal process." James v. United States Postal Serv., 835 F.2d 1265, 1267 (8th Cir. 1988). Here, Heideman consulted a lawyer and declined the attorney's offer to pursue the matter further. Heideman had the means to get

the truth he sought, but chose not to take advantage of the opportunity because of the cost. The cost of engaging private legal services, however, does not justify equitable tolling. If it did, the 180-day limitations period would be rendered largely meaningless.

In yet another age discrimination case, this Court affirmed summary judgment for the employer where the fired employee argued that payment of severance benefits over a twenty-five-week period and the employer's offer of assistance in finding another job "lulled him into sleeping on his rights," but the employee presented no evidence of deliberate misconduct by the employer. Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 358 (8th Cir.), cert. denied, 469 U.S. 1036 (1984). It is true that Heideman was told in a letter from Jeno Palucci that

he was not doing the job in a satisfactory manner. But Heideman says he knew that was not true and says he also was told he did not fit upper management's "plan." PFL did not prevent him from finding out the truth merely because it did not openly proclaim its master plan to fire older employees because of their ages.

We find no disputed issue of material fact on the equitable tolling issue, and we agree with the District Court that PFL was entitled to judgment as a matter of law. Summary judgment on the Heidemans' ADEA claim therefore is affirmed.

On the ERISA claim, interference with protected rights, 29 U.S.C. § 1140 (1982), the Heidemans argue that the cause of action did not arise until 1986 when they received the "smoking gun" memorandum. We disagree. The cause of

action accrued when Heideman was terminated in 1979. The gist of the Heidemans' claim is that Leo Heideman was discharged because, inter alia, PFL did not want to pay medical benefits to the couple. By the time Heideman was fired in 1979, the Heidemans were aware of all the facts that would put reasonable persons on notice that they had an actionable claim: they knew of their health problems, they understood that PFL was aware of their health problems, and they recognized that Leo Heideman had been fired without a legitimate reason.

Since ERISA does not have its own state of limitations, the court applies the most analogous state statute when determining whether a cause of action under the act is time-barred. See Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975), and cases cited

therein. Missouri's borrowing statute, Mo. Rev. Stat. § 516.190 (1986), which prohibits the bringing of actions barred by the laws of the state in which the actions originated, requires application of the (most analogous) Tennessee statute of limitations. The limitations period covering contracts is six years, Tenn. Code Ann. § 28-3-109 (Repl. 1980), and thus, as the District Court ruled, the ERISA claim is time-barred. The discussion concerning equitable tolling of the limitations period on the ADEA claim applies equally to the ERISA claim: the Heidemans have not come forward with any facts to create a jury issue on equitable tolling. Summary judgment on the ERISA claim is affirmed.

As for the common law tort claims, the thrust of the Heidemans' argument is that these causes of action did not accrue

until long after the 1979 termination. The Heidemans also dispute the District Court's choice of law. We agree with the District Court that Missouri's borrowing statute, Mo. Rev. Stat. § 516.190, brings these counts within the province of Tennessee law and thus subjects them to a one-year statute of limitations. Tenn. Code Ann. § 28-3-104(a) (Repl. 1980).[4] The tortious conduct complained of, the wrongful termination, occurred in Tennessee in 1979. The Heidemans' causes of action for emotional distress and loss of consortium accrued at that time, since the injuries resulting from the Tortious conduct would have appeared when PFL fired Leo Heideman or soon thereafter.

---

[4] Even if Missouri's borrowing statute did not apply, the Heidemans' claims would be time-barred by the Missouri statute of limitations on torts of this nature (five years). Mo. Rev. Stat. § 516.120(4) (1986).

See Mackey v. Judy's Foods, Inc., 654 F. Supp. 1465, 1471 (M.D. Tenn. 1987) ("Under Tennessee law, a claim accrues when a plaintiff knows or reasonably should know that he has a cause of action against a defendant. A plaintiff is not permitted to wait, however, until he knows all of the injurious effects or consequences of a wrong."), aff'd, 867 F.2d 325 (6th Cir. 1989); Security Bank & Trust Co. v. Fabricating, Inc., 673 S.W.2d 860, 864-65 (Tenn. 1983), cert. denied, 469 U.S. 1038 (1984).

On the common law fraud count, Heideman argues that the fraud was perpetrated in the time period between his demotion and his termination: he was fraudulently induced to accept the transfer. He maintains that he did not discover the fraud until receipt of the "smoking gun" memorandum. The District Court found,

and we agree, that the cause of action accrued when Heideman was fired. He was then aware that he had been transferred and, in short order, fired, and that PFL knew he had refused previous promotion offers because he did not want to move from Kansas City. The memorandum told him nothing new that was relevant to his fraud claim; it did not even mention demotions or transfers. Heideman had five years to file his claim, Mo. Rev. Stat. § 516.120(5) (1986), and he failed to meet the deadline.[5]

The discussion concerning equitable tolling under the ADEA is also applicable

---

[5] Under Missouri law, the cause of action for fraud will be "deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." Mo. Rev. Stat. § 516.120(5). Here, Heideman knew "the facts constituting the fraud" when he was discharged, thus subjecting his claim to the five-year limit. Id.

to the Heidemans' argument for equitable tolling of the statutes of limitations on the common law counts and need not be repeated. Summary judgment on the common law counts is affirmed.

Based on our review of the records, we agree with the District Court that PFL was entitled to summary judgment on all the Heidemans' claims. Although the law requires this result, our decision means only that the Heidemans waited too long to assert their claims. We in no way condone PFL's conduct. It is difficult to imagine a more offensive document in a case such as this than the "smoking gun" memorandum around which this cause of action centers, reproduced in Appendix A of the District Court's opinion. Heideman, 710 F. Supp. at 723-24. The memorandum evidences a deliberate and reprehensible company policy of

discrimination against its older employees. The document even goes so far as to recommend bonuses for the managers charged with the policy's implementation, payment of which presumably would depend upon their success in getting older employees out of PFL. But neither our compassion for the Heidemans nor the offensive nature of PFL's policy can create a fact issue on equitable tolling where no fact issue exists. "procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152 (1984) (equitable tolling denied in Title VII case where plaintiff failed to file suit within ninety days after receipt of right to sue letter). Courts are duty-bound to lay

aside their personal sympathies, even when they are not so vague, and to decide the cases that come before them in accordance with the rule of law. We do so here.

The judgment of the District Court is affirmed.

A true copy:

ATTEST:

CLERK U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1645WM

Leo Heideman and Shirley Heideman,	*	Order Denying Petition for Rehearing
Appellants,	*	and Suggestion for Rehearing
vs.	*	En Banc
PFL, INC.,	*	
Appellee.	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

July 31, 1990

Order Entered at the Direct of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEO HEIDEMAN, et ux.,	:	
Plaintiffs,	:	
vs.	:	No. 88-0010-CV-W-JWO
PFL, INC.,	:	
Defendant.	:	

MEMORANDUM AND ORDERS ON MOTION FOR SUMMARY JUDGMENT

I

The above-captioned case pends on defendant's motion for summary judgment in which the defendant asserts that all five counts[1] of plaintiffs' complaint

---

[1] Counts I alleges a violation of the Age Discrimination in Employment act of 1967, 29 U.S.C. § 621, et seq. (ADEA); Count II alleges a violation of the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. (ERISA); Count III alleges fraudulent inducement to accept transfer to Memphis; Count IV alleges intentional infliction of emotional distress; and Count V alleges loss of consortium by Mrs. Heideman.

are barred by the applicable statute of limitations. Plaintiffs maintain that "[t]here are no statute of limitations issues in the instant litigation that properly may be resolved by summary judgment. Defendant has not carried its burden of showing that no genuine issue exists as to any material fact; to the contrary, plaintiffs have indicated the existence of substantial issues as to material facts on each of their causes of action." Plts' Memo in Oppos. to Deft's Motion for S.J. on Stat. of Limit. Issues at 12.

Pursuant to discussion at a pretrial conference held August 31, 1988, the parties agreed and the Court approved that the statute of limitations issues presented in defendant's pending motion for summary judgment should be separated for determination pursuant to Rule 42(b)

of the Federal Rules of Civil Procedure. An order to that effect was entered on August 31, 1988 and an agreed schedule of briefs for the presentation of the statute of limitations issues to this Court for resolution was established. The parties were also able to agree upon a partial stipulation of facts which was filed together with both parties' reports of facts each considered material to the statute of limitation issues to which the other was unwilling to stipulate.

This Court has reviewed those stipulations, defendant's motion for summary judgment, plaintiffs' opposition to defendant's motion for summary judgment, both defendant and plaintiffs' reports on the statute of limitation issues and defendant's reply brief together with all depositions and

exhibits submitted.[2]

We find and conclude that neither the principles of equitable estoppel nor equitable tolling can be said to toll the statute of limitation applicable to either plaintiffs' ADEA claim or to plaintiffs' ERISA claim. We further find and conclude that All three remaining State common law claims are also barred by the applicable statute of limitations. PLF's motion for summary judgment on Count I (ADEA claim), Count II (ERISA claim), and the three State claims (Counts III, IV, and V) will be granted because the charge for each count was not timely filed for the reasons set out

---

[2] This includes the plaintiffs' supplementary affidavit filed February 8, 1989, defendant's reply to plaintiffs' supplementary affidavit filed February 21, 1989, and plaintiffs' reply to defendant's reply filed February 23, 1989.

below.[3]

II

Standard for Summary Judgment

The Supreme Court has recently decided three summary judgment cases, Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Celotex Corp. v. Catrett, 477 U.S. 317 (1986). This trilogy of cases clearly advocates a more liberal use of summary judgment. "Summary judgment procedure is

---

[3] Both parties recognized that a decision in favor of the defendant on the statute of limitation issue would produce a harsh result. For there can be no doubt that if plaintiff had not slept on his rights and had moved with greater dispatch to pursue the true reason for his firing before the statute of limitations had run, plaintiff would have had an open and shut case of age discrimination. However, principles stated in Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) and in Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980), foreclose the determination of statute of limitation questions on the basis of sympathy.

properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex, 477 U.S. at 327, quoting Fed. R. Civ. P. 1. See also City of Mt. Pleasant v. Associated Electric Corp., Inc., 838 F.2d 268, 273 (8th Cir. 1988) ("[A] trilogy of recent Supreme Court opinions demonstrates that [the Eighth Circuit] should be somewhat more hospitable to summary judgments than in the past. The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those cases that really do raise genuine issues of material fact.").

The purpose of summary judgment is "to

pierce the pleadings and to asses the proof in order to see whether there is a genuine need for trial." See Advisory Committee Notes to Rule 56. Summary judgment "must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." Celotex, 477 U.S. at 327.

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law. [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.[4]

The Supreme Court has made clear that the "party seeking summary judgment

---

[4] The "standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) ...." Anderson, 477 U.S. at 250. "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." Id. at 251, citing Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745, n. 11 (1983).

always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,'[5] which it believes demonstrate the absence of a genuine issue of material fact." Id. at 323. "Rule 56(e) [then] requires the nonmoving party to go beyond the pleadings and by her own affidavits or by 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324.

The nonmoving party cannot merely rest upon allegations and denials in his

---

[5] The language "if any" is clear, "summary judgment may be made pursuant to Rule 56 'with or without supporting affidavits.'" Celotex, 477 U.S. at 324.

pleadings to get to the jury without any meaningful probative evidence that tends to support his complaint. Anderson, 477 U.S. at 248, citing First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S.253, 290 (1968). A genuine issue of material fact exists, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587, citing First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968).

It must be emphasized, however, that nothing in these most recent Supreme Court cases cited above negates the rule of law mandated by earlier cases that in

ruling on a motion for summary judgment, it is the court's duty to view the facts in the light most favorable to the nonmoving party and to allow that party the benefit of all reasonable inferences to be drawn from the evidence presented. Adickes v. S.H. Kress and Co., 398 U.S. 144, 157 (1970); Inland Oil and Transport Co. v. United States, 600 F.2d 725, 727-28 (8th cir.), cert. denied, 444 U.S. 991 (1979). See also 6 J. Moore, Federal Practice ¶ 56.15[3] (2d ed. 1987).

III

Findings of Fact

The parties have stipulated to the following pertinent facts:

1. Plaintiff Leo Heideman (Mr. Heideman) was hired by defendant on or about July 12, 1964 as Regional Manager, North Central Region. Stip. ¶ 1.

2. Defendant is a Minnesota

corporation whose corporate name at all times pertinent to the instant litigation was Northland Foods, Inc.; Jeno's, Inc.; or PFL, Inc. Stip. ¶ 2.

3. In 1967, Mr. Heideman was promoted to the position of National Field Sales Supervisor and from 1970 to 1978 worked in several different management positions with defendant, as a vice president, the last of which was Vice President, Sales, for the Central Division of defendant. Stip. ¶ 5.

4. During the course of his employment with Jeno's, Inc., Mr. Heideman worked primarily out of his home in Kansas city, Missouri and traveled on a varying basis (approximately on a monthly basis) to the corporate headquarters of Jeno's, Inc., in Duluth, Minnesota. He would ordinarily stay in Duluth when making these visits, a day

and a night.

5. On or about December 6, 1978, Carl Hill (Mr. Hill) was employed by defendant as Senior Vice President, Marketing and Sales. He had previously been employed by defendant from about 1967 or 1968 until 1972. At the time he left defendant's employment in [1982], he was Executive Vice President of Marketing and Sales. Stip. ¶ 9.

6. On or about January 3, 1979, Mr. Hill's actual authority was made co-extensive with that of the then president of defendant, Dick Jones (Mr. Jones), and Mr. Hill reported directly to the chairman and vice chairman of defendant, not to Mr. Jones. Stip. ¶ 10.

7. On or about December 21, 1978, Mr. Hill wrote a confidential memorandum (the Hill memo) to Mr. Jones regarding what Mr. Hill referred to as "additional

responsibilities for Parr and Carpenter." Parr and Carpenter, as referred to in the Hill memo, were John Parr (Mr. Parr), then the Vice President of Sales of defendant, and Morris J. carpenter (Mr. carpenter), then the Vice President of Marketing of defendant, both of whom reported to Mr. Hill. Mr. Parr was then Mr. Heideman's immediate supervisor. Stip. ¶ 11.

8. Courtesy copies of the Hill memo[6] were directed to be delivered to Messrs. Parr, Carpenter, and Mick Paulucci (Mr. Paulucci). Mr. Paulucci was then the Vice Chairman of the Board of Directors of defendant. The document appended to this stipulation as "Exhibit A" appears to be a true copy of the courtesy copy of that memo delivered to

---

[6] A copy of this memo is attached as Appendix A and incorporated herein by this reference in our findings of fact.

Mr. Carpenter; however, defendant does not know who made the handwritten comments thereon, nor when they were made. Stip. ¶ 12.

9. Mr. Hill admits that it is possible, but thinks it unlikely, that he wrote the following words in the upper right-hand corner of the first page of the Hill memo "Jay -- Read and Destroy." Stip. ¶ 13.

10. Around Christmas 1978, when Mr. Heideman was visiting defendant's office in Duluth, Minnesota, Mr. Hill called Mr. Heideman into Mr. Hill's office and advised Mr. Heideman that Mr. Heideman was being demoted from Vice President, Sales - Central Division, to Manager of the Memphis Region, that he was expected to build up the Memphis Region, that he would have to move immediately and take over this new responsibility, and that

Mr. Heideman would not receive any reduction in pay with respect to this demotion. Stip. ¶ 14.

11. After considering the proposed relocation to Memphis, Tennessee and demotion, and discussing the same with Mrs. Heideman, Mr. Heideman decided to accept the offered relocation and responsibility. Had he not accepted the offer, he would not have been able to continue his employment with defendant. Stip. ¶ 15.

12. Mr. Heideman was replaced as a vice president of defendant by Ed Korkki (Mr. Korkki). Mr. Korkki was born July 18, 1940. Stip. ¶ 16.

13. On or about June 1, 1979, Mr. Heideman was advised by Mr. parr by telephone that Mr. Heideman was being terminated, immediately. Stip. ¶ 18.

14. Mr. Heideman lived, worked, and

was in Tennessee at the time that he was terminated, and had been assigned to the Memphis territory for approximately five months. Mrs. Heideman also resided in Tennessee with her husband. Stip. ¶ 19.

15. Mr. Heideman, during his entire employment by defendant, never heard of any problems within defendant's nrganization concerning age discrimination. It never occurred to him, until he subsequently received a copy of the Hill memo in 1986, that he might have been the victim of age discrimination practices by defendant. Stip. ¶ 20.

16. At the time of his termination or shortly thereafter, Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated, and that he was being lied to. Stip. ¶ 21.

17. Mr. Heideman suspected, after being notified of his termination, that he had been lied to by Mr. Hill when he was demoted and offered the position in Memphis, in that Mr. Hill then actually wanted to cause Mr. Heideman to voluntarily resign, or terminate him shortly after transferring him to the Memphis office, not have him build the Memphis Region. Mr. Heideman did not have any opinion or belief, however, as to the real reason he was terminated. Stip. ¶ 22.

18. Mr. Heideman visited a federal agency office in Memphis, Tennessee, which he believes to have been the National Labor Relations Board, in an effort to see if he could get some help in forcing defendant to tell him the reason for his termination. The agency representative with whom he met stated

that they were unable to help him, and referred him to a private attorney in Memphis. Mr. Heideman does not recall any mention made regarding age discrimination laws during his visit at the agency office. Stip. ¶ 23.

19. The same day Mr. Heideman visited the federal agency office, he visited with the attorney referred to him by the agency representative. The attorney advised Mr. Heideman that the employer did not have to give him a reason for termination, but could terminate him without a reason. The attorney offered to look into the matter if Mr. Heideman was willing to pay him $70 per hour. Under the circumstances, Mr. Heideman decided it did not make sense to employ the attorney, so he just dropped the matter. Mr. Heideman does not recall any mention made regarding age discrimination

laws during his visit with the attorney. Stip. ¶ 24.

20. Almost immediately after being advised by Mr. Parr that Mr. Heideman was terminated, Mr. and Mrs. Heideman decided to return to Kansas city. Thex sold their house in the Memphis area on or about August 1, 1979 and immediately moved back to Kansas City. Stip. ¶ 25.

21. On or about August 29 or August 30, 1986, Mr. Heideman received from Mr. Lawrence Williams (Mr. Williams) an unsolicited copy of the Hill memo. This was the first time Mr. Heideman suspected that he may have been the victim of age discrimination practices by defendant. Stip. ¶ 26.

22. Within two or three days after his receipt of the Hill memo, Mr. Heideman visited the Equal Employment Opportunity Commission (EEOC) office in Kansas city,

Missouri. Mr. Heideman filed a charge of discrimination with the EEOC on or about September 5, 1986. Stip. ¶ 27.

23. Mr. Heideman visited with one of his attorneys in the instant litigation, Mark J. Klein (Mr. Klein) on September 6, 1986, to determine if he had a right to private action against defendant arising out of defendant's actions. Stip. ¶ 28.

24. On August 23, 1986, before he had knowledge of the hill memo, Mr. Heideman wrote to Jeno Paulucci stating his belief that he "was moved for a reason then fired on purpose." Stip. ¶ 29.

25. Plaintiff filed suit in the Circuit Court of Jackson County, Missouri on November 25, 1987, and this action was subsequently moved to this Court on January 4, 1988. Stip. ¶ 30.

Under the procedures directed pursuant to this Court's August 31, 1988 order,

the parties also set forth those facts which they deemed material and in genuine issue in regard to the contentions made. We find and conclude that plaintiff has not presented any material facts in genuine issue for reasons that we state in the text to follow.

IV. **Analysis**

A. **ADEA Claim (Count I)**

In Count I of the complaint, plaintiffs allege that Mr. Heideman's termination from defendant's company which occurred Jund 1, 1979 (see Stip. 18) was in direct violation of ADEA in that plaintiff's firing was the result of a "blatant and outrageous scheme of age discrimination." Memo in Oppos. to Deft's Mot. for S.J. on Stat. of Limit. Issue at 1. Plaintiffs maintain that defendant fraudulently concealed the true reason why Mr. Heideman was fired from the plaintiff and

that they, "cannot be held barred from a cause of action." Id. "Plainly and simply, this case is about corporate concealment of illegal activity which, upon first discovery by the plaintiffs, was acted upon with immediacy. Contrary to defendant's arguments ... none of plaintiffs' claims are barred by applicable statute of limitations." Id. at 2.

In order for plaintiffs to prevail on Count I, they must have filed a charge of age discrimination with the Equal Employment Opportunity Commission (EEOC) within 180 days of alleged unlawful employment practice. 29 U.S.C. § 626(d).[7] Such a filing is a condition

---

[7] 29 U.S.C. § 626(d) provides:

No Civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Opportunity Commission. Such a

precedent to later filing a suit under ADEA. Kriegesmann v. Barry-Wehmiller, 739 F.2d 357 (8th Cir. 1984), cert. denied, 469 U.S. 1036 (1984). Suit must be filed within two years of the alleged unlawful practice or within three years in the case of a willful violation. 29 U.S.C. § 626(e). The unlawful employment practice in this case occurred on June 1, 1979.[8]

In some circumstances, the 180-day filing period provided under ADEA may be equitably tolled. Zipes v. Trans World Airlines, Inc., 455 U.S.385, 393 (1982).

Two types of equitable tolling have

---

charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred ....

[8] For a discussion of the Eighth Circuit's position on when the unlawful employment practice occurs and thus triggers the running of the statute, see Wilson v. Westinghouse Electric Corp., 838 F.2d 286, 288 (8th Cir. 1988).

been acknowledged by the courts: (1) equitable tolling which focuses on the plaintiff's excusable ignorance of the statue period (see Abbott v. Moore Business Forms, Inc., 439 F. Supp. 643, 646-49 (D.N.H. 1977); Wright v. State of Tennessee, 628 F.2d 949 (6th Cir. 1980)), and (2) equitable estoppel which tends to focus upon actions taken by the defendant (see Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977); see also Caudill v. Farmland Industries, Inc., 698 F. Supp. 1476 (W.D. Mo. 1988).

Plaintiffs here assert both grounds for tolling the statute of limitations -- that he was excusably ignorant of his cause of action because he did not see the posted notice of his ADEA rights, and that he was unaware of his claim because of the misconduct on the part of defendant in giving him a pretextual

reason for his termination. Similarly, because of defendant's misconduct, defendant should be estopped from asserting the statute of limitations as a defense.

Plaintiffs allege that they learned of the unlawful discrimination motive only upon receipt of a copy of the hill memorandum (see Appendix A) on August 29 or 30, 1986. "[I]t never occurred to Mr. Heideman, nor did he have any suspicion, until he received a copy [of the memo] ... that he might have been the victim of age discrimination ...." Memo in Oppos. to Deft's Mot. for S.J. on Stat. of Limit. Issue at 7.

The Eighth Circuit has given some guidance as to when such tolling can occur:

> The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is

> the consequence either of a deliberate design by the employer or of actions that the employer should unmistakenly have understood would cause the employee to delay filing his charge. Kriegesmann, 739 F.2d at 358-59, citing Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982).

Other circuits have similar guidelines.[9]

1. **Notice Posting**

Equitable tolling can occur if the

---

[9] When the defendant wrongfully deceives or misleads the plaintiff in order to conceal the existence of a cause of action, the 180-day period will be tolled. English v. Pabst Brewing Co., 828 F.2d 1047 (4th Cir. 1987), cert. denied, 108 S.Ct. 2037 (1988) ("a time bar may be tolled on equitable grounds 'if the employee could show it was impossible for a reasonably prudent person to learn that his discharge was discriminatory'") (Id. at 1050) citing Miller v. International telephone and Telegraph corp., 755 F.2d 20, 24 (2d Cir.), cert. denied, 474 U.S. 851 (1985). See also Lawson v. Burlington Industries, 683 F.2d 862, 864 (4th Cir.), cert. denied, 459 U.S. 944 (1982); Cerbone v. International Ladies' Garment Workers' Union, 768 F.2d 45, 48 (2d Cir. 1985); Coke v. General Adjustment Bureau, 640 F.2d 584, (5th Cir. 1981).

defendant fails to post the required notice setting forth employees' rights under ADEA. Kriegesmann, 739 F.2d at 358.

Defendant has offered the affidavits of Mr. Sprague[10] and Mr. Henningsgard[11] which state that the required ADEA notices were in fact posted in the company headquarters in Duluth.[12] The statement by Mr. Heideman that he never saw any kind of notice posted on a bulletin board or elsewhere in defendant's office or other facilities, concerning age discrimination laws (Plt's Depos. at 174), is not enough to toll the statute nor does it create a factual issue for trial. See Posey v. Skyline

---

[10] Exhibit A of Deft's Mot. for S.J.

[11] Exhibit B of Deft's Mot. for S.J.

[12] Plaintiffs offer no evidence that such notices were not posted.

Corp., 702 F.2d 102, 105 (7th Cir.), cert. denied, 464 U.S. 960 (1983) (employee's statement that he did not recall ever reading a notice of ADEA rights was insufficient to create a question of fact).

The fact that plaintiff worked primarily out of his home rather than out of a corporate office does not affect the tolling issue. Such a question was clearly answered in Hrzenak v. White-Westinghouse Appliance Co., 510 F.Supp. 1086, 1092 (W.D. Mo. 1981), aff'd, 682 F.2d 714, 718 (8th Cir. 1982). "[E]mployee's assertion that he never saw any notices should not of itself require tolling ...." Id. at 1092.

2. **Affirmative Misconduct**

We turn now to the question of whether the defendant engaged in any affirmative

misconduct[13] which would cause the

---

[13] For examples of what type of misconduct is and is not sufficient to allow equitable estoppel or tolling see Wilson v. westinghouse Electric Corp., 838 F.2d 286 (8th Cir. 1988); English v. Pabst Brewing Co., 828 F.2d 1047 (4th Cir. 1987); Lawson v. Burlington Industries, Inc., 683 F.2d 862 (4th Cir.), cert. denied, 103 S.Ct. 257 (1982) (summary judgment granted defendant -- no tolling where employee believed employer would eventually rehire him through no misconduct by employer); Price, 694 F.2d 963 (4th Cir. 1982); O'Malley v. GTE Service Corp., 758 F.2d 818 (2d Cir. 1985) (no affirmative misconduct found when employer delayed in sending certain retirement forms); Miller v. International Tel. & Tel. Corp., 755 F.2d 20 (2d Cir. 1985), cert. denied, 474 U.S. 851 (1985); Cerbone v. International Ladies' Garment Workers' Union, 768 F.2d 45 (2d Cir. 1985) (tolling would occur while employee waits to see if employer honors promise of reinstatement); and see Coke v. General Adjustment Bureau, Inc., 640 F.2d 584 (5th Cir. 1981); Ott v. Midland-Ross Corp., 600 F.2d 24 (6th Cir. 1979); Bonham v. Dresser Industries, Inc., 569 F.2d 187, (3d Cir. 1977), cert. denied, 439 U.S. 821 (1978); Glus v. Brooklyn Eastern District Terminal, 359 U.S.231 (1959) (defendant misled plaintiff as to necessity of filing claim); Atkins v. Union Pacific Ry. Co., 685 F.2d 1146 (9th Cir. 1982) (tolling occurred where defendant tells plaintiff he intends to settle dispute over termination).

plaintiff to delay filing his ADEA claim and subsequent suit and thus toll the limitations period. The statute will not be tolled unless the employer's failure to file in a timely manner is a consequence either of a deliberate design by the employer, or of actions that the employer should unmistakenly have understood would cause the employee to delay filing his charge. Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 358-9 (8th Cir.), cert. denied, 469 U.S.1036 (1984).

Plaintiffs allege that the following facts when taken in combination amount to the requisite employer "deliberate design" which would result in equitable tolling of the statute under the test set forth in Kriegesmann. The fact that (1) Mr. Heideman was given a pretextual reason for his termination; (2) the hill

memo establishes an age discrimination policy; (3) there was an offer of an additional payment of $5,000 to Mr. Williams[14] if he would not circulate the Hill memo to anyone; and (4) Mr. Heideman was identified as one of the "middle-aged 'professional' sales managers" who Mr. Hill wanted replaced.[15] We find that none of these facts singly or in combination would justify tolling.

Plaintiff must come forward with evidence to show that what he was told by the defendant or actions taken by the defendant were intended to lull the plaintiff into sleeping on his rights and

---

[14] Mr. Larry Williams was also an employee of defendant and he had timely filed an age discrimination lawsuit against the defendant which resulted in a $75,000 settlement.

[15] Mr. Williams testified in his deposition that he had at least two conversations with Mr. hill in which Mr. Heideman was so identified. Williams' Depos. 69-73.

he must show actual and reasonable reliance upon defendant's misconduct or representations. See Naton v. Bank of California, 649 F.2d 691, 696 (9th Cir. 1981).

The fact that defendant may have misled the plaintiff as to why he was fired is not enough. Plaintiff must rely on those misrepresentations. "[T]he attempt to mitigate the harshness of a decision terminating an employee, without more, cannot give rise to an equitable estoppel." Kriegesman, 739 F.2d at 358.[16]

Mr. Heideman was told by Mr. parr that he was fired because he no longer fit

---

[16] [T]he failure to tell plaintiff that he was demoted because of his age is not the type of deception or fraud that operates to toll the limitations period." Klausing v. Whirlpool Corp., 623 F.Supp. 156, 162 (S.D. Ohio 1985), appeal dismissed without opinion, 785 F.2d 309 (6th Cir. 1986).

into Mr. Hill's plans (Plt's Depos. at 82-85), however, plaintiffs' counsel states that Mr. Heideman never believed the reason given by Mr. Parr. "At the time of his termination or shortly thereafter, Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated, and that he was being lied to." Stip. ¶ 21. In reply to the question "when did you first believe that Carl Hill had deceived you?" [about the reason given for termination], plaintiff replied, "five minutes after I hung up the phone ...." Plt's Depos. at 123. Mr. Heideman states that he felt he was "terminated for what I saw was totally unjustifiable reason, it just didn't make any sense ...." Id, at 84; "I was moved [transferred to Memphis] for a reason and then fired on purpose." Plt's Depos. at

121 referring to deft's Exh. 7. "I was deceived ...." Id. Mr. Heideman was so sure he had not been given the true reason that he went to what he now believes was the National Labor Relations Board to see if he cotld get help in finding out the true reason. Stip. ¶ 23.

Even before his termination, Mr. Heideman had misgivings about the way he was being treated by the defendant. Plaintiffs' counsel concedes that "Mr. Heideman was transferred by defendant to Memphis under circumstances Mr. Heideman considered extremely questionable ...." (Emphasis added). Plts' Report on Stat. of Limit. Issues at 6. Counsel further concedes in Stipulation 22 that Mr. Heideman did not believe the reason given by Mr. hill for his demotion and transfer to Memphis. At no time prior to his demotion was Mr. Heideman advised of any

complaints about his job performance. Plt's Depos. at 57-58, 143-44. At no time prior to his termination was Mr. Heideman advised of any complaints about his job performance. Id. at 77-82, 96.

Furthermore, Mr. Heideman visited an attorney concerning his termination to find out if he could somehow uncover the true reason for his termination but he decided "it did not make sense to employ the attorney, so he just dropped the matter." Stip. ¶ 24. Mr. Heideman was also aware that he was replaced by a man 15-20 years his junior, Mr. Korkki. Plt's Depos. at 141.

Equitable tolling results in a delay of the running of the statute of limitations until "'the plaintiff either acquires actual knowledge of the facts that comprise his cause of action or should have acquired such knowledge through the

exercise of reasonable diligence after being apprised of sufficient facts to put him on notice.'" (Emphasis added). Cerone v. International Ladies' Garment Workers' Union, 768 F.2d 45, 48 (2d Cir. 1985) citing City of detroit v. Brinnell Corp., 495 F.2d 448, 461 (2d Cir. 1974).

Given the foregoing facts and circumstances[17] surrounding Mr. Heideman's termination, we find and conclude that there were sufficient facts so that a reasonably diligent employee[18]

---

[17] "Whether to grant equitable relief from the statutory provisions is a matter that should be determined 'on a case-by-case basis, depending on the equities in each case." Naton, 649 F.2d at 696 citing Hageman v. Philips Roxane Lab., Inc., 623 F.2d 1381, 1385-86 (9th Cir. 1980).

[18] The factual circumstances in Vaught v. R.R. Donnelley & Sons Co., 745 F.2d 407 (7th Cir. 1984), are similar to the instant case. There the plaintiff knew he was demoted, knew he was replaced by a younger man and knew he had consistently obtained good job performance evaluations. The district

would have been put on notice of his cause of action. Therefore there is no justification for equitable tolling of the statute of limitations nor do the circumstances create a factual issue for trial.

Plaintiff Heideman urges this court to deny defendant's motion for summary judgment on the basis of material facts at issue and cites among others Meyer v. Riegel Products Corp., 720 F.2d 303 (3d Cir. 1983). In Meyer the court held that a summary judgment was not appropriate because a material question of fact existed for the jury to determine where plaintiff had a suspicion that he had not been given the true reason for dismissal and had consulted an attorney. The case

---

court found that the statute began to run when he was aware of those facts listed above and not when he first learned that his employer had replaced most managers over 50 with younger men. Id at 410-11.

at hand presents many more factors to be considered than just suspicion and consultation -- enough factors which make it possible for this Court to conclude that summary judgment is appropriate.

In the instant case there is ample evidence that plaintiff did not rely upon the pretextual reason given, it was plaintiff's own lack of diligence that led him to the present impasse. Every such plaintiff has an affirmative duty to make inquiry about his legal rights and to pursue those rights with due diligence. See, e.g., United States v. Kubrick, 444 U.S.111 (1979); see also, Wehrman v. United States, 830 F.2d 1480, 1484 (8th Cir. 1987).

Based upon the foregoing analysis, we find and conclude that defendant's motion for summary judgment on Count I (ADEA claim) of plaintiff's complaint should be

and is hereby granted.

B. **ERISA Claim (Count II)**

Count II of plaintiffs' complaint alleges violations of Section 510 of ERISA (Interference with Protected Rights) and plaintiffs maintain that they are entitled to "relief under the provisions of 29 U.S.C. §§ 1132 and 1140 in that defendant's action in discharging Mr. Heideman had the purpose and effect of substantially decreasing Defendant's Retirement Plan benefits ...." Heideman Petition at 9..

ERISA itself does not contain a statute of limitations for the bringing of civil of civil action to recover benefits or to enforce rights under a pension plan. Therefore, the court must look to the most appropriate state statute of limitations. Johnson v. Railway Express Agency, 421 U.S.454, 462 (1975).

The choice of state law applicable here is either Tennessee or Missouri, however, the Court need not decide the choice of law question because under either state law, plaintiffs' cause of action is time-barred.[19]

The facts in this case are clear that there is no basis for equitable tolling of the applicable statute of limitations for the reasons given in the Court's earlier discussion of plaintiffs' ADEA claim.

For the reasons stated above, we find and conclude that defendant's motion for

---

[19] Under Tennessee law an action under 29 U.S.C. § 1132 is governed by the six-year statute of limitations applicable to contracts. Tenn. Code Ann. § 28-3-109 (1980); Haynes v. O'Connell, 599 F.Supp. 59, 62 (E.D. Tenn. 1984). Under Missouri law an even shorter period of five years would apply. Mo. rev. Stat. § 516.120(1); Fogerty v. Metropolitan Life Ins. Co., 666 F.Supp. 167, 169 (E.D. Mo. 1987), aff'd, 850 F.2d 430 (8th Cir. 1988).

summary judgment on Count II (ERISA claim) of plaintiffs' complaint should be and is hereby granted.

C. State Common Law Claims

1. Intentional Infliction of Emotional Distress (Count IV) and Loss of Consortium (Count V)

Plaintiffs have a variety of theories under which they maintain that neither Missouri's five-year statute of limitations[20] nor Tennessee's one-year statute of limitations[21] defeats their claims in Counts IV and V.

First, plaintiffs argue that their

---

[20] What actions within five years.

(4) An action for ... any other injury to the person or rights of another, not arising on contract ....

Mo. Rev. Stat. § 516.120.

[21] "Actions for libel, for injuries to the person, false imprisonment, malicious persecution, ... shall be commenced within one (1) year after cause of action accrued." Tenn. Code Ann. § 28-3-104(a).

cause of action did not accrue at the time of plaintiff's termination in July 1979 but that their cause of action arose when they received the Hill memorandum on August 29 or 30, 1986. Plaintiffs argue that their cause of action was fraudulently concealed from them and that Mo. Rev. Stat. § 516.280 applies "[i]f any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such an action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented.

Second, plaintiffs argue that their cause of action did not arise until later than 1979. Plaintiffs cite Mo. Rev. Stat. § 516.100 "[T]he cause of action shall not be deemed to accrue when the wrong is done or the technical breach of

contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained." Plaintiffs maintain that the last item of damage occurred in 1984 while plaintiff was living in Missouri when plaintiff began losing his sight or at some unspecified future date when his emotional distress began to subside, also while plaintiff resided in Missouri.

Thirdly, plaintiffs contend that defendant should be equitably estopped from pleading Tennessee's one-year statute of limitations because plaintiffs were long-established Missouri residents and only were located in Tennessee for a few months and then only because

defendant induced them to move to Tennessee.

Defendant maintains that both counts are barred by Missouri's borrowing statute, Mo. Rev. Stat. § 516.190 (1989 Supp.) which states: "Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state." Since Counts IV and V are personal injury torts which arose in Tennessee, they are governed by Tennessee law.

> Actions for libel, for injuries to the person, false imprisonment, malicious persecution ... shall be commenced within one (1) year after the cause of action accrued.

Tenn. Code Ann. § 28-3-104(a) (1980).

For the reasons set forth below, we find and conclude that plaintiffs' Count

IV and Count V both are time-barred by the Missouri borrowing statute.

The Eighth Circuit has made clear that "[t]he plain meaning of the [borrowing] statute in question is that where the tort takes place in a foreign jurisdiction, Missouri will adopt the statute of limitations of that jurisdiction barring the cause of action." McIndoo v. Burnett, 494 F.2d 1311, 1313 (8th Cir. 1974). In the instant case, the tortious conduct -- the termination of plaintiff -- took place in Tennessee. Stip. ¶ 18.[22] The plaintiff

---

[22] The fact that plaintiff was called by phone from Duluth and informed he was terminated does not affect the determination that the tort took place in Tennessee. The cause of action for an injury to an individual occurs where that individual was located at the time of the injury. Electric Theater Co. v. Twentieth Century-Fox Film Corp., 113 F.Supp. 937 (W.D. Mo. 1953). See also Western Newspaper Union v. Woodward, 133 F.Supp. 17 (W.D. Mo. 1955) (It is the general law ... that in tort actions

resided in Tennessee at the time of the wrongful termination. The injuries sustained by the plaintiff occurred in Tennessee when he was terminated and not at some later date as plaintiff maintains.

2. Fraudulent Inducement to Accept Transfer to Memphis, Tennessee (Count III)

Plaintiffs' final count is based on the same set of allegations as plaintiff maintains in his ADEA claim earlier discussed. Plaintiff contends that defendant defrauded him into transferring to Memphis, Tennessee and then terminated him due to his age. Complaint ¶¶ 35, 37; Plt's Depos. at 147. Plaintiff argues that this fraud began in December 1978 when he was offered the transfer and

---

governed by state law, the law of the state in which the injury or loss was suffered and which, hence created the right, governs the tort ...." Id. at 23.

ended when he was terminated in June 1979. Plaintiff states, however, that the fraud was not discovered until August 1986 upon receipt of the Hill memo and thus plaintiff may take advantage of Mo. Rev. Stat. § 516.120(5): "An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting fraud."

Here plaintiffs' argument fails as it has previously failed. This cause of action began to run upon plaintiff's termination in 1979. At which time he felt "deceived" about his transfer. Plt's Depos. at 84. Further evidence of when a reasonable person would have been aware of the facts constituting fraud have been previously dealt with in this

memorandum and order and will not be reiterated here.

It is therefore

ORDERED (1) that defendant's motion for summary judgment on Counts I, II, III, IV, and V should be and the same is hereby granted. It is further

ORDERED (2) that the Clerk of this Court shall enter final judgment in favor of defendant and against plaintiff in accordance with Rule 58 of the Federal Rules of Civil Procedure.

/s/ John W. Oliver
Senior Judge

Kansas City, Missouri
April 11, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

	Civ. File Nos.
Richard McFadden	5-88-0183
Donald I. Fifield,	5-88-0183
Ronald Schermerhorn	5-88-0184
Frank Faso, and	5-89-015
William Brand,	5-89-051

Plaintiffs,

v. ORDER

ETOR Properties Limited Partnership, successor to P.F.L., Inc. and Jeno's, Inc., formerly Known as Jeno's, Inc., a Minnesota corporation,

Defendants.

David P. Sullivan, Esq., Sullivan & Setterlund, Ltd., 825 Alworth Building, Duluth, MN 55802, for the plaintiffs.

Peter Dorsey, Esq., John M. Mason, Esq., George A. Koeck, Esq., Dorsey & Whitney, 2200 First Bank Place East, Minneapolis, MN 55402, for the defendant.

This matter is before the court upon defendants' motion for summary judgment on all of plainthffs' claims. For the

reasons set forth below, the court denies defendants' motion.

Factual Background

In this action plaintiffs Richard McFadden, Donald I. Fifield, Ronald Schermerhorn, Frank Faso and William brand allege that the termination of their employment with defendant Jeno's, Inc. (Jeno's) violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq, the Employee Retirement Income Security act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., and, as to plaintiffs McFadden and Faso, the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363.02 et seq. Plaintiffs have also named as defendants ETOR Properties Limited Partnership (ETOR) and P.F.L., Inc. (PFL), the successors to Jeno's.

Jeno's employed each of the plaintiffs

in its sales and marketing division as regional sales managers. Plaintiffs were responsible for selling Jeno's frozen pizza product line to food brokers in plaintiffs' respective regions. Jeno's terminated each plaintiff on the following dates:

McFadden	October 24, 1981, age 41
Fifield	June 7, 1979 at age 57
Schermerhorn	June 7, 1979 at age 43
Faso	April of 1982 at age 59
Brand	Jan. 2 or 3, '79 at 45

The sole basis for plaintiffs' discrimination claims is a December 21, 0978 memorandum from Carl Hill to Dick Jones with copies to John Parr, Jay Carpenter and Mick Paulucci (the Hill Memorandum). Each of these recipients, as well as the author, was an officer or manager at Jeno's at the time. A handwritten note in the upper right-hand corner of the memorandum states, "Jay - Read and Destroy." A copy of the

memorandum is attached as Exhibit A to this opinion. Each plaintiff became aware of the hill memorandum during or after December of 1987.

Defendants challenge plaintiffs' claims on statute of limitations grounds. Consequently, the termination dates, the circumstances surrounding each termination, and the dates on which each plaintiff became aware of the Hill memorandum are all important factors to be considered.

According to plaintiffs, Jeno's business was characterized by an aggressive management style and frequent turnovers of the work force. Employees were often fired with little notice or explanation. Management allegedly was encouraged to fire regional managers on a regular basis in order to keep everyone "on their toes." Plaintiffs contend that

this working environment, along with Jeno's representations to them, led them to believe that they were no different from anyone else who had been fired. In short, plaintiffs claim that they were lured into believing that age was not a factor in their terminations.

In particular, each plaintiff believed that either his actions, or business conditions generally, compelled his own termination. In the case of Schermerhorn and Brand, Jeno's management allegedly cited shortcomings in their performance as the reason for their terminations. Shortly before his discharge, Schermerhorn had been severely reprimanded by Hill for scheduling an important meeting in a room that was too small. When Schermerhorn inquired about the reason for his discharge, he was told that "Carl Hill wants it that way."

Consequently, Schermerhorn assumed that his firing stemmed from his conflict with Hill. After Brand's termination, Carpenter cited problems related to Brand's communication with the marketing department. Brand also had refused a transfer to Duluth and was told by Hill that his future with the company was in jeopardy as a result.

McFadden, Fifield and Faso each thought that Jeno's terminated them as part of a departmental reorganization. They had been informed that business was down in their regions and that a change in personnel was necessary. None of the plaintiffs suspected that age discrimination had played a role in their terminations.

The plaintiffs first suspected that they were victims of discrimination when they received or heard about the Hill

memorandum. According to plaintiffs' testimony, they first became aware of the memorandum, filed charges with the Equal Employment Opportunity Commission (EEOC) and state agencies, and initiated civil actions on the following dates:

	Aware of Memo	Charge date	Action filed
McFadden	12/87	4/20/88	9/1/88
Fifield	1/88	4/20/88	9/1/88
Schermerhorn	12/87	4/20/88	9/1/88
Faso	12/87	8/29/88	1/27/89
Brand	7/88	12/16/88	3/15/89

Defendants challenge plaintiffs' claims on two grounds. First, defendants argue that plaintiffs failed to file EEOC charges within the statutory time period. Second, plaintiffs' ADEA claims, and their ERISA and MHRA claims, are barred by the applicable statutes of limitations. Plaintiffs respond that the ADEA filing requirements and the statutes of limitations were tolled by defendants'

actions.

Analysis

In deciding defendants' motion for summary judgment the court must apply the standards sdt forth in Fed. R. Civ. P.56(c). The defendants bear the initial burden of informing the court of the basis for their motion, and of identifying those portions of the pleadings, depositions, and affidavits which they believe demonstrate the absence of a genuine issue of material fact. Celotex Corp. V. Catrett, 477 U.S. 317, 323 (1986). In order to defeat the motion, plaintiffs must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The judge's function at the summary judgment stage is not to weigh the evidence, but to determine whether there is a genuine issue for trial. Id. at 249.

As a prerequisite to commencing a civil action, an ADEA plaintiff must file a charge with the EEOC alleging discrimination. In a state which has its own discrimination laws, a so-called "referral state," the charge must be filed "within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier." 29 U.S.C. § 626(d) and § 633(b). E.E.O.C. v. Commercial Office Products Co., 486 U.S. 107, 108 S.Ct. 1666, 1675-76 (1988) (300 day period applies to

Title VII claim regardless of whether claim falls within state limitations period); E.E.O.C. v. Shamrock Optical Co., 788 F.2d 491, 493-94 (8th Cir. 1986) (same); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755-56 (1979) (Title VII and ADEA are parallel provisions subject to similar interpretation). Minnesota is a referral state. Therefore the 300-day filing requirement, rather than 180-day limitation as urged by defendants, applies to plaintiffs' claims. ADEA claims are also subject to a two-year statute of limitations or three years for willful violations. 29 U.S.C. § 626(e)(1) and 29 U.S.C. § 255(a).

In the case at hand none of the plaintiffs' EEOC charges were filed within 300 days of plaintiffs' respective terminations. Similarly, none of plaintiffs' civil actions were commenced

within either two or three years of the time each of them was fired. EEOC charges were filed within 300 dams after each plaintiff became aware of the Hill memorandum, however, and each plaintiff's action was brought within two years of the discovery date as well. Unless the applicable time limitations are tolled from the date of termination until the time of discovering the Hill memorandum, plaintiffs' ADEA claims are clearly time-barred.

Since the Supreme Court resolved a split among the circuits in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1984), the charge filing requirements of Title VII and the ADEA, as well as the corresponding statutes of limitations, have been subject to equitable tolling. Even before Zipes, the Eighth Circuit allowed tolling. In

Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 358-59 (8th Cir. 1984), cert. denied, 469 U.S.1036 (1984) the court held that the ADEA

> will not be tolled on the basis of equitable estoppel unless the employee's failure to file in a timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge.

(quoting Price v. Litton Business Systems, Inc., 694 F.2d 963, 965 (4th Cir. 1982)). The Eighth Circuit recently quoted the same passage with approval in Walker v. St. Anthony's Medical center, 881 F.2d 554, 557 (8th Cir. 1989). Courts have also allowed tolling in cases where the plaintiff demonstrated excusable ignorance of the statutory period. See Abbott v. Loore Business Forms, Inc., 439 F. Supp. 643, 646-49 (D. N.H. 1977); Wright v. State of Tennessee,

628 F.2d 949 (6th Cir. 1980). However, the latter reason for tolling has not been cited by the plaintiffs in this case.

In Heideman v. PFL, Inc., 710 F.Supp. 711 (W.D. Mo. 1989), the district court rejected a tolling argument similar to the one asserted by plaintiffs in this case. There the plaintiff, Leo Heideman, was terminated from Jeno's at about the same time as plaintiffs in the case at hand. Heideman filed a charge of discrimination with the EEOC over six years after his termination and brought a civil action over a year after the charge. The court granted summary judgment for PFL, Inc., finding that Heideman's claims were time-barred. Defendants contend that Heideman is indistinguishable from the instant case and that plaintiffs' claims should

therefore be dismissed.

The court in Heideman found that the plaintiff failed to carry the two-part burden necessary for equitable tolling. The court explained that "[p]laintiff must come forward with evidence to show that what he was told by the defendant or actions taken by the defendant were intended to lull the plaintiff into sleeping on his rights and he must show actual and reasonable reliance upon defendant's misconduct or representations." Id. at 719. The court emphasized the second aspect of the burden. "The fact that defendant may have misled the plaintiff as to why he was fired is not enough. Plaintiff must rely on those representations." Id.

The Hill memorandum provides strong evidence that Jeno's not only had a policy of discriminating against older

employees, but that Jeno's management took steps to conceal its policy. The memorandum describes a number of problems associated with "middle-aged people." Specifically, it states that "[a]fter the age of 50 a man becomes a liability in two ways: a. He can't find a job anywhere else and we are married to him until retirement. b. He becomes less responsive to job change, i.e. no more transfers, no additional challenges." Hill then lays out a strategy for building an effective sales force:

> We need to create a field sales force that consists of men between 25 and 45 who are highly motivated by bonuses and trying to make their mark on the world. If done properly this would create a situation in which we had strong young regional management, highly motivated, constantly "pushing" for promotion, and in general striving for the goal of success.

For tolling purposes the following passages of the memorandum are

instructive.

> If by some chance we have men approaching the "problem age" we should be willing and ready to help those men move on by making their exit from Jeno's a comfortable one. This would be accomplished by having a frank discussinn with a man between '45 and 50 and telling him his future at Jeno's is limited and that it would be advisable for him to look for work elsewhere.
>
> * * *
>
> No one needs to be the wiser and we would then be able to re-orient that region with younger more motivatable personnel.

This language at least creates a genuine issue of material fact with respect to the existence of a deliberate design by the employer to prevent plaintiffs from filing a timely discrimination charge. The note on the memorandum to "read and destroy" the document supports this conclusion.

The court's ruling in Heideman is not to the contrary. The court did not rule that Heideman failed to show a deliberate

design. Rather, the court concluded, based on the stipulated record, that Heideman never relied on actions or representations by the defendant. "At the time of his termination or shortly thereafter, Mr. Heideman felt that the reason that Mr. Parr gave him was not the real reason that he was being terminated, and that he was being lied to." Heideman, 710 F.Supp. at 719. In fact, "Mr. Heideman was so sure he had not been given the true reason [for his termination] that he went to what he now believes was the National Labor Relations Board to see if he could get help in finding out the true reason." Id. Accordingly, the court found "ample evidence the plaintiff did not rely upon the pretextual reason given." Id. at 720.

The case of Klausing v. Whirlpool

Corp., 623 F.Supp. 156 (D. Ohio 1985) is distinguishable for the same reason. In Klausing the court stated, "It is clear from the record, and plaintiff candidly admits, that he at least suspected that he was demoted because of his age." Id. at 162. Thus plaintiff could not have relied on any conduct or misrepresentations that would require tolling.

The Fifth Circuit case of Blumberg v. HCA Management Co., Inc., 848 F.2d 642 (5th Cir. 1988), cert. denied, 109 S.Ct. 789, supports defendants' argument. Based on the trial record, the court found that the plaintiff should have been on notice of any possible discrimination at the time of discharge. This conclusion was warranted because the plaintiff "was advised at the time of her termination that she was being discharged

for cause, and she was able to evaluate the propriety of the reasons for her dismissal immediately." Id. at 645. Blumberg is not controlling in the instant case, however, because the record is not sufficiently developed for the court to make the kind of determinations that the trial court in Blumberg made. At the summary judgment stage the court is compelled to view the record in the light most favorable to the nonmoving party. Having done so, the court is unable to say that no issues of material fact remain to prevent defendants from being entitled to judgment.

The same principles apply to the plaintiffs' claims under ERISA and the MHRA. The statutes of limitations applicable to both types of claims are subject to equitable tolling. Prior to 1981, the MHRA contained a six-month

filing requirement that operated as a jurisdictional prerequisite. However, after amendments in 1981 the MHRA filing requirements became subject to tolling in the same manner as those of Title VII and the ADEA. Carlson v. Independent School Dist. No. 623, 392 N.W.2d 216 (Minn. 1986). Thus McFadden and Faso, who were discharged in 1981 and 1982 respectively, may maintain their MHRA claims.

Accordingly, IT IS HEREBY ORDERED that defendants' motion for summary judgment is DENIED.

Dated: December 21, 1989.

/s/ Paul A. Magnuson
United States District Court
Judge